IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 19[redacted]

No. [redacted] 19[redacted]

CLIFFORD TAGGART, ET AL. *Petitioners*

v.

WEINACKER'S, INC. *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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Clifford Taggart, business agent of Retail Clerks' Union Local 458 of Mobile (the Union) (R. 23), Riley Hobbs, vice president of the Union, James Stuckey, president of the Union (R. 1), and the Union pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on September 19, 1968.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 214 So. 2d 913 (*infra*, p. 1a). The opinion of the Circuit Court of Mobile County, Alabama, is unreported (*infra*, p. 23a).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 19, 1968 (R. 125, *infra*, p. 22a). A petition for rehearing was denied on November 7, 1968 (R. 126). An order was entered on February 4, 1969 by Mr. Justice Hugo L. Black extending the time for filing a petition for a writ of certiorari to April 5, 1969. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing on the publicly-used but privately-owned sidewalks adjacent to a store, in support of a strike by the store employees, called by the union certified by the National Labor Relations Board to represent them, to secure employment terms acceptable for work at the store after a breakdown of negotiations with the employer for a collective bargaining agreement. The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to adjudicate the controversy, because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the federal right to engage in "concerted activities for . . . mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in Appendix E (*infra*, pp. 29a-33a).

STATEMENT

A. The Physical Layout of the Area Surrounding the Store

In the city of Mobile, Alabama, respondent Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building. Weinacker's owns this building and the area which surrounds it. Within this area sidewalks encircle the building, walkways lead to it, and a motor vehicle parking lot for the use and convenience of the customers in parking their automobiles is located between the front of the building and the public property which adjoins the parking lot. The main entrance to the store building fronts to the south on the private sidewalk; the adjacent motor vehicle parking lot separates the store building and the private sidewalk from a public street called Government Street. The privately-owned area which surrounds the store building is bounded on three sides by public streets, Government Street to the south, Catherine Street to the east, and Macy Street to the west. Public sidewalks are adjacent to these public streets. Weinacker's also operates an automobile service station across Catherine Street to the east. (R. 79, 1.)

B. The First Request for Immediate Injunctive Relief

On January 21, 1965, Weinacker's filed its original bill with the Circuit Court of Mobile County, Alabama, against the Union, its president, its vice-president, and

its business agent, collectively called respondents (R. 1, 22, 76). The bill alleged that (1) Weinacker's "owns the . . . shopping center . . . and its parking area and walkways adjacent to the shopping center . . . used by the customers of the shopping center" (R. 19); (2) the three individual respondents "walked back and forth in front of the door or doors to the shopping center on the area owned and occupied" by Weinacker's "engaged in picketing the shopping center" (R. 4-21); and (3) this picketing constitutes an "unlawful trespass upon its premises" (R. 2). Claiming "irreparable injury" by a "continuous invasion" of its "property and property rights", Weinacker's prayed that the court "forthwith issue a temporary writ to enjoin" the Union and the individual respondents from "directly and indirectly . . . entering upon property of Weinacker's and "that they be enjoined from any act on the property . . . which would be a trespass upon . . . property . . ." (R. 23). The court on the same day denied the request for temporary relief instanter and set the petition for that relief down for hearing on January 25, 1965 (R. 4). On January 22, 1965 the Union and the individual respondents moved to quash the bill on the ground that the court "has no jurisdiction over a lawful strike and the peaceful picketing activities connected therewith" in that the "National Labor Relations Board, federal statutes and procedures have preempted this field . . ." (R. 6-7).

C. The Second Request for Immediate Injunctive Relief

On January 22, 1965, after the court had set the request for temporary relief down for hearing, Weinacker's again petitioned "for immediate injunctive relief." It asserted that two named individual re-

spondents "have proceeded to constantly trespass upon" Weinacker's "property by marching or parading back and forth to the immediate doorway of" its "place of business" and that "this conduct has been more intensive," since the petition for temporary injunctive relief had been set for hearing. It urged that "immediate injunctive relief", is necessary "to enjoin the continuous obstructing of the doorway to the . . . shopping center." (R. 8.) The request was supported by six conclusory and identically-worded affidavits averring that "Respondents have trespassed upon . . . [Weinacker's] property to the extent of obstructing the customers in entering and leaving the door of Weinacker's . . . and that the Respondents in carrying signs are acting in such a way as to interfere with . . . [Weinacker's] business and such action is on the private property" of Weinacker's. (R. 9). An *ex parte* injunction issued forthwith, without any notice or opportunity to be heard, prohibiting "trespassing upon the property of . . . [Weinacker's] and . . . interfering with . . . [Weinacker's] property and right of ingress and egress to the . . . property and place of business" (R. 14, *infra*, p. 29a).

D. The Plea to the Jurisdiction of the Court Based on the Preemption of the Subject Matter by the National Labor Relations Board

On January 25, 1965, the Union and the individual respondents filed a plea to the jurisdiction of the court (R. 15-23). The plea averred that the Union was a labor organization and Weinacker's an employer within the meaning of the National Labor Relations Act (R. 15-16); that the business of Weinacker's "affects" interstate commerce within the meaning of the

National Labor Relations Act, and its labor relations are subject to the exclusive jurisdiction of the National Labor Relations Board" (R. 21); that the activities of the Union and the individual respondents "constitute concerted activity for their mutual aid or protection, the right to engage in which is guaranteed and protected by the National Labor Relations Act" (R. 21); that "the National Labor Relations Board assumed jurisdiction over the subject matter of . . . [Weinacker's] bill and said jurisdiction is exclusive" (R. 21); and that the jurisdiction of the court is "therefore pre-empted . . ." (R. 22).

The plea documented the following specific facts: On December 19, 1963 the Union filed a petition with the NLRB seeking certification as the representative of certain of the employees of Weinacker's (R. 16, 24-25). On February 13, 1964, following a hearing held on January 20, 1964, the NLRB Acting Regional Director, upon finding that Weinacker's "is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction", directed an election in a unit composed of "All full-time and regular part-time employees at Employer's Mobile, Alabama, retail operation, including office clerical employees and the grocery, produce, meat, drug, warehouse, and service station departments . . ." (R. 16-17, 25-28). An election was conducted on March 9, 1964, and resulted in a vote of 18 employees for the Union, 12 against, with 27 ballots challenged (R. 17, 31). On March 13, 1964, Weinacker's filed objections to the conduct of the election (R. 17, 32-33). On April 16, 1964, following an investigation of the objections and the challenged ballots, the NLRB Regional Director issued a decision over-

ruling the objections, resolving the challenged ballots, and certifying the Union as the representative of the unit of employees (R. 17-18, 34-44). On April 25, 1964, Weinacker's requested the NLRB to review the Regional Director's decision, and on May 22, 1964, the NLRB denied the request because "it raises no substantial issues warranting review" (R. 18, 45-55).

On August 31, 1964, amended on September 16 and 30, 1964, the NLRB Regional Director issued a complaint against Weinacker's alleging the commission of numerous unfair labor practices spanning the period from the filing of the representation petition through and after the Union's certification (R. 18-19, 55-67). In summary, the complaint alleged: (1) interrogation of employees concerning their union activities, desires, and feelings, (2) threat of store closure, (3) threat of discharge of any employees who had anything to do with the Union, (4) surveillance of union meetings and activities, (5) statement that no new employees would be hired unless they were against the Union, (6) promise of benefit to an employee for information concerning union leaders, (7) prohibition of wearing of union buttons, (8) promulgation and enforcement of a rule against union solicitation within the store, (9) discharge of nine employees because of their union activity, (10) furnishing four employees less employment because of their union activity, and (11) denial of dining and rest room facilities to two employees because of their union activity (R. 58-61, 65, 67). The complaint further alleged that Weinacker's had defaulted in its bargaining obligation by (1) refusing to bargain in good faith, (2) refusing to furnish wage and related information relevant to bargaining, and (3) unilaterally changing existing employment terms

(R. 62-63, 65). Weinacker's joined issue by a general denial (R. 20, 68-71), and on October 12, 1964, a hearing was begun before an NLRB trial examiner (R. 20).

The plea to the jurisdiction further averred that (1) the refusal of Weinacker's to bargain in good faith "led to a strike which was started by the Respondents on the 12th day of December, 1964" (R. 20); (2) "At no time has there been any force or violence resulting from the peaceful picketing on the part of the Respondents" (R. 20-21); and (3), to enjoin the Union's activities "would infringe upon the rights" of the Union and its members "under the First and Fourteenth Amendment to the Constitution of the United States" (R. 21-22), and would enter the domain preempted by the NLRB (R. 22).

At the time that the plea to the jurisdiction was entered, no decision upon the unfair labor practice complaint had been reached (R. 20). On April 15, 1965 the trial examiner issued, and on June 25, 1965 the NLRB adopted, his decision finding that Weinacker's had committed the unfair labor practices alleged. *Weinacker Brothers, Inc.*, 153 NLRB 459. The decision summarized the unfair labor practices as follows (*id.* at 484-485):

> [1. Weinacker's] interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by the following conduct:
>
> (a) Unlawfully interrogating employees with regard to their own and their fellow employees' union activities and sentiments.
>
> (b) Threatening to close the store before accepting the Union as the collective-bargaining representative of its employees.

(c) Threatening to discharge employees for adherence to the Union.

(d) Threatening not to hire any employees who are in favor of the Union.

(e) Threatening to reduce hours of work of employees should the Union become their bargaining representative, rather than to give them full employment at union scale.

(f) Threatening to engage in, and engaging in, surveillance of employees' protected activities.

(g) Soliciting employees to withdraw their union authorization cards and helping them to accomplish such action.

(h) Promising a benefit for withdrawing adherence to the Union.

(i) Prohibiting the wearing of union buttons.

(j) Promulgating and maintaining a rule prohibiting solicitation by employees on behalf of the Union or with respect to other protected activities in nonworking areas and during nonworking time except on its selling floor.

(k) Enforcing a no-solicitation rule prohibiting solicitation by union officials while engaging in an extensive antiunion campaign in working areas and on employees' working time.

(l) Threatening to discharge an employee for responding to a subpena to testify in a National Labor Relations Board hearing instead of reporting to work.

[2. Weinacker's] violated Section 8(a)(3) and (1) of the Act by the following conduct:

(a) Discriminatorily discharging Burl Beck, Lorenzo Matthews, Harry Wright, Cleveland Dortch, Marguerite Etheredge, Mildred Turner,

W. J. Williams, Elizabeth Boyette, and Sadie Burgess.

(b) Discriminatorily reducing the workhours of Elizabeth Boyette, Sadie Burgess, Jack Smith, and Donald Harris.

(c) Discriminatorily denying certain employees the dining and restroom facilities they had customarily used.

[3. Weinacker's] violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with said Union, commencing on May 25, 1964, as the collective-bargaining representative of the unit described hereinabove.

On June 28, 1966, the Court of Appeals for the Fifth Circuit summarily enforced the NLRB order remedying the unfair labor practices found.[1]

E. The Decision of the Circuit Court of Mobile County

On January 25, 1965, the same day that it was filed, the plea to the jurisdiction was overruled (R. 73). On February 1, 1965, the Union and the individual respondents answered (R. 73-76). They averred that they had "legally picketed back and forth in front of the door of the shopping center" (R. 74); denied that they had "obstruc[ed] customers from leaving or entering . . . [Weinacker's] place of business" (R. 75), or that their conduct constituted an illegal trespass (R. 74); affirmed that their acts were within "the realm of peaceful picketing . . . legal under the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States" (R. 75); and reiterated that the court's juris-

[1] *N.L.R.B. v. Weinacker Bros., Inc.*, C.A. 5, No. 23,510.

diction was preempted (R. 74). The answer concluded with respondents' motion to dismiss the bill and to dissolve the injunction that had been issued (R. 75).

On March 26, 1965, more than two months after the *ex parte* injunction had issued, a nonevidentiary hearing of the motion to dismiss and dissolve was held (R. 78). On April 9, 1965, the Circuit Court issued its decision (R. 78-82, *infra*, pp. 23a-27a). The court found that a labor dispute existed; that the Union had been certified by the NLRB as the representative of the employees of Weinacker's; and "that numerous differences have existed and do now exist between . . . [Weinacker's and the Union] over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the . . . Union called a strike which is now in progress" (R. 79, *infra*, p. 23a). The court further found that "Picketing was first carried on by the Respondents on the public sidewalks of the City of Mobile and later on the sidwalks on . . . [Weinacker's] premises and in front of the entrances to . . . [Weinacker's] storebuilding. While this picketing on . . . [Weinacker's] premises and in front of the entrances to its building has been without any acts of actual violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of . . . [Weinacker's] in entering and leaving the entrances to said building on the south or Government Street side thereof" (R. 79-80, *infra*, p. 24a). The court further found that the picketing continued after Weinacker's, "through one of its officials, had requested the respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of . . . [Wein-

acker's] premises to the public sidewalks of the City of Mobile adjoining the same" (R. 80, *infra*, p. 24a).

In considering the legal import of these findings, the court stated that "the first question in this case is whether or not the State Courts have jurisdiction to hear it. And, the second question is whether or not, if the State Courts do have jurisdiction of the subject matter, the Respondents' activities . . . are the subject of injunctive relief" (R. 81, *infra*, p. 25a). Answering the first question, the court held that "where a store owner invites prospective customers to come to his store to trade and to park on his grounds, made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for *any* purpose to the general public, and the use of the store owner's parking lot and sidewalks is of a purely private character over which the State Courts retain jurisdiction to hear suits seeking injunctive relief to bar trespassing" (R. 81, *infra*, p. 26a). Answering the second question, the court held that "it was unlawful for the Respondents to trespass on the Complainant's premises by picketing, after being requested to leave. Freedom of speech, guaranteed to the Respondents by the First and Fourteenth Amendments to the Federal Constitution, did not give them the right to remain on the parking area and sidewalks of . . . [Weinacker's] after they were ordered to leave" (R. 82, *infra*, p. 26a).

The court concluded that it "does have jurisdiction of the subject matter involved in this suit which has not been divested by the National Labor Relations Act" (R. 82, *infra*, p. 26a). It further concluded that "the Respondents, by going on . . . [Weinacker's] premises for the purpose of picketing the . . . store-

building of [Weinacker's], were trespassers, and were employing an unlawful means of exercising their right to picket . . ." (R. 82, *infra*, p. 27a). It decreed that the injunction "heretofore issued . . . be . . . continued until ordered dissolved by due process of law" (R. 82, *infra*, p. 27a). That injunction prohibits "trespassing upon the property of . . . [Weinacker's] and . . . interfering with the . . . property [of Weinacker's] and right of ingress and egress to the . . . property and place of business [of Weinacker's]" (R. 14, *infra*, p. 29a).

F. The Decision of the Supreme Court of Alabama

On April 9, 1965, an appeal was taken from the Circuit Court's judgment to the Supreme Court of Alabama (R. 82-83). The appeal was argued and submitted on November 10, 1965 (R. 94). The appeal was decided on September 19, 1968 (R. 95, *infra*, p. 1a), almost three and one-half years after it had been taken, and almost three years after it had been submitted. In the interim this Court on May 20, 1968 had decided *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, holding that the First Amendment forbade the issuance of a state court injunction prohibiting as a trespass picketing at the premises of a store within a shopping center publicizing a union's labor dispute with the store.

The Supreme Court of Alabama affirmed the judgment of the Circuit Court (R. 125, *infra*, p. 22a).[2]

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[2] The judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court both because the federal questions have been finally decided (*Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 312-313, n. 5) and because a substantial claim of preemption of state court jurisdiction is made (*Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 543-550, 552).

On the question of preemption of state court jurisdiction, the Supreme Court held that (R. 123, *infra*, pp. 20a-21a):

> The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not reasonably arguable that the Congress intended to exclude the states from jurisdiction over trespass by picketing on privately owned property, which does not have the quasi-public character of a town street or business block, in a manner so as to obstruct entrances to a store.

On the question of the constitutional protection of picketing as free speech, the Supreme Court held that (R. 123-124, *infra*, p. 21a):

> The respondents say, in their second particular, that the court erred in enjoining their union picketing activity because they have a constitutional right to picket peacefully as an exercise of freedom of speech. Without further lengthening this opinion, we hold that the court did not err in this respect because picketing involves something more than free speech, and because the right to picket must be balanced against the right of the owner to use his property in a lawful manner and the interest of the state in restraining trespass which is a potential cause of violence. So far as this record discloses, picketing on the streets abutting complainant's store lot is not materially less effective than picketing on the lot itself.

REASONS FOR GRANTING THE WRIT

I

The decision below is in conflict with, and should be summarily reversed on the authority of, this Court's decision in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308.

The essence of *Logan Valley* is that an employer who opens his property to the public—to customers in order to secure their patronage of his store and to others in the community in order to operate his store—cannot close his property to employees who seek by peaceful picketing in the immediate vicinity of the store to publicize the store's disfavored labor policy. The purported differences identified by the court below between *Logan Valley* and the instant situation emphasize the absence of a valid distinction.

1. The court below states that Weinacker's is a smaller shopping center than Logan Valley Plaza (R. 108, *infra*, p. 10a), and its parking lot, walkways and sidewalks do "not have the quasi-public character of a town street or business block . . ." (R. 123, 114-115, *infra*, pp. 20a-21a, 15a). The size of the enterprise is not the criterion, nor can property which has been opened to the public be deprived of its openness by declining to affix the label "quasi-public" to it. The relevant inquiry is whether peaceful picketing is "carried on in a location open generally to the public . . ." (391 U.S. at 313); as in *Logan Valley*, so here, the "general public has unrestricted access to the mall property" (*id.* at 318); and so here, no less than in *Logan Valley*, as the property "'is freely accessible and open to the people in the area and those passing through.' . . . the State may not delegate the power,

through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put" (*id.* at 319-320).

Indeed, this case may be considered *a fortiori* to *Logan Valley*. The picketing in *Logan Valley* was stranger picketing conducted by nonemployees to inform the public of the nonunion character of the store. 391 U.S. at 314-315. The picketing in this case supported a strike by the store's own employees to obtain a collective bargaining agreement after negotiations with their employer by their union certified as their representative had failed (*supra*, pp. 8, 11).[3] These employees are not trespassers when, in order to work for Weinacker's, they park their car on its lot and tread its walkways and sidewalks to get into its store. These same employees do not become trespassers when, in order to obtain acceptable employment terms for their work in that store, they picket on the same sidewalks near the entrance to the same store to support their demands. And so, even more than in *Logan Valley*, the picketing was "directly related" to the store; it was conducted on the publicly-used premises in the immediate vicinity of the store; and the store owner should not "be permitted to avoid this incidence of carrying on a public business in the name of 'private property.'" 391 U.S. at 325-326 (Mr. Justice Douglas concurring).

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[3] This is a minimum statement of the nexus of the picketing to the dispute it publicized. The Union averred that Weinacker's refusal to bargain in good faith "led to" the strike (*supra*, p. 8), and the NLRB later found that Weinacker's had refused to bargain in good faith with the Union (*supra*, p. 10).

Nor can it make a difference, as the court below seemingly suggests, that "the trespass is on the premises of a single store owner . . ." (R. 112, *infra*, p. 14a). What matters is whether the property has been opened to the public, not whether there is one or more than one owner.

2. The court below states that "picketing involves something more than free speech . . ." (R. 123, *infra*, p. 21a). But it also involved something more than pure speech in *Logan Valley*. The speech-plus aspect of picketing pertains to its character as a physical patrol and authorizes placing a "limit [on] the location and manner of the picketing or the number of picketers" in the vicinity of the store's entrance; it does not authorize a ban by which the picketing is "prohibited absolutely" in that vicinity. 391 U.S. at 321. The "mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct." *Id.* at 323. Nor can the court below justify the suppression on the ground that picketing on privately-owned but publicly-used premises "is a potential cause of violence" (R. 123, 115, *infra*, pp. 21a, 15a-16a). This chimera of potential violence was identically present in *Logan Valley*, and it is as unavailing here, as it was in *Logan Valley*, to justify suppression of picketing—"protected by the First Amendment" (391 U.S. at 313)[1]—in the vicinity of the store.

3. The court below states that in this case, unlike *Logan Valley*, the picketing was conducted "in a man-

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[1] "[O]ur decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection." *Shuttlesworth* v. *City of Birmingham*, 39 U.S. Law Week 4203, 4204 (S. Ct. March 10, 1969).

ner so as to obstruct entrances to the store" (R. 123, 107, 108, 112, 115, *infra*, pp. 21a, 10a, 11a, 14a, 15a). But the unchallenged parts of the injunction in *Logan Valley* prohibited "blocking access by anyone to respondents' premises, making any threats or using any violence against customers, employees, and suppliers of Weis, and physically interfering with the performance by Weis employees of their duties." 391 U.S. at 312, n. 4, 321, n. 10, 323, n. 13. Accordingly, in this case as in *Logan Valley*, obstructive picketing, if any existed,[5] would entitle a state court "to limit the location and manner of the picketing or the number of picketers within the mall in order to prevent in-

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[5] The sole evidence to support the finding of obstructive picketing are six conclusory and identically-worded affidavits averring trespass "to the extent of obstructing the customers in entering and leaving the door of Weinacker's" and "carrying signs in such a way as to interfere with business . . ." (*supra*, p. 5). These affidavits were used to support the issuance of the *ex parte* injunction barring all access to the premises, an injunction issued with no notice or opportunity of any kind to be heard. As was explained concerning the evil causing enactment of the Norris-LaGuardia Act, "The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined . . . ." S. Rep. No. 163, 72d Cong., 1st Sess., 8. There "is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. President and Commissioners of Princess Anne*, 37 U.S. Law Week 4041, 4042 (S. Ct., Nov. 19, 1969). Furthermore, while the Union has repeatedly averred that its picketing was peaceful and nonobstructive (*supra*, pp. 8, 10), no evidentiary hearing to resolve the factual issue has ever been held. There is thus nothing of record on the question of obstructive picketing except conclusory and identically-worded affidavits. This method of handling facts in the area of First Amendment freedoms is procedurally fundamentally infirm. See, *Speiser v. Randall*, 357 U.S. 513, 520-529.

terference with either access to the market building or vehicular use of the parcel pickup area and parking lot." 391 U.S. at 321. But the courts below cannot in this case, any more than the Pennsylvania courts could in *Logan Valley*, invoke obstructive picketing to hold that "'picketing and trespassing' can be prohibited absolutely on . . . [Weinacker's] premises." *Ibid.* Obstructive picketing authorizes the elimination of the obstruction, not the elimination of picketing.

4. The court below states that "picketing on the streets abutting . . . [Weinacker's] store lot is not materially less effective than picketing on the lot itself" (R. 123-124, *infra*, p. 21a). This is neither relevant nor accurate. It is irrelevant because *Logan Valley* reiterates the teaching that "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" 391 U.S. at 323-324. It is inaccurate because picketing on the public streets is screened from the store by the intercepting parking lot located in between. To confine the picketing to the public streets creates precisely that "*cordon sanitaire* of parking lots" around the store which *Logan Valley* condemns. 391 U.S. at 325. The immediate vicinity of the store is the natural and effective place to communicate the picket's message. The parking lot interposes a buffer between the communicant and his audience and therefore inescapably blunts the expression of First Amendment rights.

5. The court below states that the injunction barring picketing within Weinacker's premises is "'aimed narrowly at a trespass . . .'" (R. 107, 111, *infra*, pp. 10a, 13a). To label the injunction "narrow" does not

change its engulfing character. It works just the total exclusion from the premises, whether it be called regulation or suppression (391 U.S. at 321), which *Logan Valley* prohibits. Upon a proper showing of need an injunction may be narrowly drawn to control the number and location of pickets and the manner of picketing in the vicinity of the store. But to bar picketing altogether from the opened premises is the antithesis of a narrow injunction allowing picketing at the public place but circumspectly controlling its physical incidents.[6]

6. Accordingly, when the court below states, in support of the injunction, that "the right to picket must be balanced against the right of the owner to use his property in a lawful manner" (R. 123, *infra*, p. 21a), all that it in reality asserts is the "claimed absolute right under state law to prohibit any use of . . . [the owner's] property without . . . [its] consent" (391 U.S. at 324). But "Naked title" is no more available in this case than it was in *Logan Valley* to justify total exclusion from property opened to the public. *Ibid.*

Accordingly, the decision below in this case cannot stand compatibly with this Court's decision in *Logan Valley*. The decision below should therefore be sum-

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[6] "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Carroll* v. *President and Commissioners of Princess Anne*, 37 U.S. Law Week 4041, 4043 (S. Ct., Nov. 19, 1968).

narily reversed in order to put an abrupt end to experimentation with circumvention of the plain import of *Logan Valley*.

II

The second question presented is whether the determination of a dispute over whether or not picketing may be conducted on privately-owned but publicly-used property in the course of a labor dispute is initially within the sole competence of the NLRB. This Court in *Logan Valley* granted certiorari to review the question whether "the state courts were without jurisdiction . . . because the controversy involves issues that are within the exclusive jurisdiction of the National Labor Relations Board"; it did not reach the question because decision was based on First Amendment grounds. 391 U.S. at 309-310, n. 1. Demurring from predicating the decision on the First Amendment, and regretting that the pre-emption question had not been properly preserved, Mr. Justice Harlan observed that "it seems clear . . . that the petitioner has a substantial pre-emption claim." *Id.* at 333-334. Mr. Justices Black and White, while dissenting from the conclusion that the First Amendment had been violated, separately emphasized that they did not reach any issue under the National Labor Relations Act. *Id.* at 329, n. 3; 340. The NLRB in its amicus brief in *Logan Valley* expressed the view that to "subject the picketing here to State court jurisdiction would entail a real danger of creating the very conflicts and 'frustration of national purposes' which *Garmon* and the other preemption decisions of this Court have sought to avoid" (br. pp. 5-6, 13). In conflict with

the decision below, the Washington Supreme Court[7] and other courts[8] hold that the conduct is within the domain preempted by the NLRB. The preemption question was presented and decided at every stage of this case at *nisi prius* and on appeal. This Court should therefore settle finally this important and recurrent question on which a contrariety of judicial opinion continues to vex the administration of labor relations.

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the NLRB. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary

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[7] *Freeman* v. *Retail Clerks Local No. 1207*, 58 Wash. 2d 426, 368 P. 2d 803.

[8] *Maryland* v. *Williams*, 44 LRRM 2357, 2362-64 (Md. Crim. Ct., June 10, 1965); *Weis Markets* v. *Retail Store Employees' Union, Local No. 692*, 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967).

picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, 498-499. Similarly, in regulating organizational and recognition picketing, Congress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters*, 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63.

It is therefore clear that a state court enters "the pre-empted domain of the National Labor Relations Board" insofar as it enjoin[s] . . . peaceful picketing. . . ." *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted on the exterior grounds of the private but opened property of a store does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution "'belongs to the usual ad-

ministrative routine' of the Board."[9] In a variety of contexts private property has been required to yield to the statutory guaranty of protected concert.[10] "We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."[11]

Commitment of the question to initial determination by the NLRB is illustrated by that agency's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden

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[9] *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130.

[10] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2). See also, *Interlake S.S. Co.*, 174 NLRB No. 55, 70 LRRM 1177 (access by union organizers to ship while crew is in port to solicit union adherence).

[11] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951.

Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377); "It is open to the public for pedestrian use" (98 NLRB at 93). The Court of Appeals for the Seventh Circuit enforced the NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the situation to the standard expressed by this Court in *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike the exterior grounds of a store, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the store's exterior grounds is crucial. To prohibit peaceful picketing on otherwise open property is to hold that a "theoretical invasion"

of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924). The *Babcock & Wilcox* standard supports no such result.[12] As the NLRB itself has observed, as part of its rationale to support its finding that a store owner committed an unfair labor practice "when it prohibited a union representative from entering its parking lot to solicit membership from its employees," the "parking lot was open to the public and employees." *Priced-Less Discount Foods*, 162 NLRB No. 75, 64 LRRM 1065.

Furthermore, banning peaceful picketing on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry to the property of every element of the public except that part of the community with a labor message directed at and adverse to the store is invidious. The Circuit Court justifies this discriminatory debarment on the explicit ground that, "where a store owner invites prospective customers to come to his store to trade and to park on his grounds, made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for *any* purpose to the general public . . ." (*infra*, p. 26a). Conversely, therefore, it excludes other members of the public who by peaceful picketing "may

[12] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston*, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute" (*Thornhill* v. *Alabama*, 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[13]

The specific enmeshment of the instant controversy in the work of the NLRB is particularly plain. The NLRB found that Weinacker's had engaged in massive unfair labor practices designed to thwart union organization culminating in its refusal to bargain in good faith with the Union when the employees nevertheless chose collective representation (*supra*, pp. 8-10). This finding of unfair labor practices is directly relevant to the question of entry on the exterior store grounds to picket. In determining whether or not to require an employer to permit access to its property by nonemployee union representatives, and in prescribing conditions for entry when required, the NLRB takes into account the employer's commission of unfair labor practices. Thus, in opening a store parking lot used

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[13] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226. "'It is not every interference with property rights that is within the Fifth Amendment. . . .'" *Id.* at 232; *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 802, n. 8. In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499).

by the public to entry by a nonemployee union organizer, the NLRB observed that the employer "had engaged in widespread unfair labor practices. . . ." *Priced-Less Discount Foods*, 162 NLRB No. 75, 64 LRRM 1065. Similarly, in opening to nonemployee union organizers for six months "access to [nonpublic] plant parking lots and plant approaches during nonworking time," the NLRB observed that the employer had "committed massive unfair labor practices which were, in substantial part, of a kind deliberately calculated to thwart the Union's attempts to communicate with employees through the usual channels." *Marlan Industries Corp.*, 166 NLRB No. 58, 65 LRRM 1626, 1632, enforced as modified, 70 LRRM 2472, 2474 (C.A. 6, Jan. 29, 1969). Whether or not the unfair labor practices committed by Weinacker's in this case are similarly relevant to the permissibility of picketing in the immediate vicinity of its store only the NLRB can initially say. A state court has no power to determine the existence of unfair labor practices or their relevance to access to property as a remedy.

In short, one function of the NLRB is to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audience cannot "be defeated through the simple assertion . . . of a landlord's interest." *Harlan Fuel Co.*, 8 NLRB 25, 32. The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing conducted on the exterior grounds of the private but open property of a store. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of

private property. Peaceful picketing on the exterior grounds of a store is no exception. A state court retains the authority to control the physical incidents of picketing on those grounds but it has no power to bar picketing altogether because of private ownership.

Accordingly, apart from narrow state regulation of the physical incidents of picketing, the elements of the controversy place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245. Heedless of this principle, the court below "entered the preempted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl v. Rainfair*, 355 U.S. 131, 139.

III

While it would unhappily compel a return to "a now discarded approach to pre-emption" (*N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23), a conclusion that the courts below are empowered to adjudicate the controversy presents for this Court's review the important question whether the state courts rightly determined that the "activity enjoined in the instant case is . . . [not] protected by § 7 . . . of the National Labor Relations Act" (R. 123, *infra*, p. 203). Peaceful picketing in support of a primary strike to secure improved employment terms is a preeminent expression of concerted activity for

mutual aid or protection. To screen the offending employer from picketing by interposing a parking lot between the workers and the situs of the dispute seriously weakens their ability to enlist public support to refrain from patronizing or serving the struck store, to dissuade employees from taking jobs at the struck store as strike replacements, and to maintain the strikers' own solidarity and morale. This divorcement of the picketing from the immediate vicinity of the store is especially detrimental in this case because it further dislocates the balance of economic power between the workers and the employer which the massive unfair labor practices committed by Weinacker's had already badly disjointed. And assuming, but not granting (*supra*, p. 18, n. 5), that obstructive picketing took place, this factor would authorize no more than an injunction narrowly drawn to reach only the physically obstructive aspects of the picketing (*Youngdahl* v. *Rainfair*, 355 U.S. 131, 137-140; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-732), leaving its continuance at the situs of the dispute otherwise unmolested. Absolute exclusion of all picketing from the immediate vicinity of the store results therefore in state prohibition of the "'exercise of rights which the federal Acts protect.'" *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75. Accordingly, in this case, as it did in *Logan Valley*, this Court should grant certiorari to review the question whether "the picketing herein was protected as a 'concerted activity for . . . mutual aid or protection' by § 7 of the National Labor Relations Act . . .". (391 U.S. at 309-310, n. 1).

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted. The judgment should be summarily reversed on the authority of *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308. Alternatively, the cause should be set down for plenary briefing and argument.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Alabama

Filed September 19, 1968

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL SESSION, 1968

1 Div. 295

CLIFFORD TAGGART, ET AL.

v.

WEINACKER'S, INC., A CORP.

Appeal from Mobile Circuit Court, In Equity

COLEMAN, JUSTICE.

Respondents appeal from a decree denying their motion to dissolve a temporary injunction.

Complainant filed a verified bill of complaint averring that it possessed and operated a shopping center at the intersection of Government and Catherine streets in Mobile, and that the continuing trespass by respondents on complainant's lot deprived it of peaceful possession and caused it irreparable injury.

On a petition, treated as an amendment to the bill, the court granted a temporary injunction restraining the trespass.

Respondents filed a plea to the jurisdiction asserting that state court jurisdiction of the subject matter had been pre-empted by the National Labor Relations Act and that the National Labor Relations Board had taken jurisdiction of the dispute between these parties in proceedings filed by respondents with the Board, and that the Board

"7. The trial court's ruling of April 1, 1965 that the court had jurisdiction of the subject matter involved in the suit was contrary to the law of this cause. (Transcript pg. 82).

"

"10. The order of the trial court on April 4, 1965 holding that the primary jurisdiction of the subject matter in dispute had not been pre-empted by the National Labor Relations Board and denying the Respondents' Motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants' (sic) Verified Bill and Petition was contrary to the law in this cause. (Transcript pg. 82)."

Complainant argues that assignment 2 is bad because it fails to show how or in what way the court erred. We are not inclined to agree with this argument. The assignment says the court erred in overruling respondents' plea to the jurisdiction. This shows how the court erred.

Complainant says assignment 7 and 10 are bad and complainant is probably correct. These assignments do not assert that the court erred and merely say that the ruling was contrary to law. *National Association For The Advancement of Colored People v. State*, supra, and *Andrews v. May*, 277 Ala. 248, 249, [1], 168 So. 2d 619.

Even if assignments 2, 7, and 10 are bad, however, all the assignments in this group are related because they are governed by the same legal principles and argument, to wit, that the trial court had been divested of jurisdiction because the National Labor Relations Act had pre-empted jurisdiction of the subject matter of the suit. Assignments 3 and 4 appear to be good assignments and we will consider them, although other related assignments argued in the group are bad. *Gilliland & Echols Farm Supply & Hatchery v. Credit Equipment Corp.*, supra.

In the second group of assignments, which are argued together, is assignment 1 which recites:

> "1. The trial court erred in issuing a Writ of Injunction on January 22, 1965. (Transcript pg. 14)."

The order of January 22, 1963, was made without the hearing provided for by § 1054, Title 7, Code 1940. "No appeal lies from the order granting the injunction unless the order is shown by the record to have been made, or purports to have been made, after a hearing as provided by § 1054, Title 7, Code 1940 (§ 8304, Code 1923). *Berman v. Wreck-A-Pair Building Co.*, 234 Ala. 293, 297, 175 So. 269. The order of January 22, 1965, granting the injunction will not support an appeal.

In an appeal involving a similar order granting a temporary injunction without a hearing as provided by § 1054, Title 7, this court said:

> "In our opinion, the assignments of error which challenge the decree of March 19, 1960, in so far as it orders the issuance of a temporary injunction present nothing for our review, for an appeal does not lie from an order or decree granting a temporary injunction unless the record shows that the order or decree was made or purported to be made after a hearing as provided by § 1054, Title 7, Code 1940. (Citations Omitted)

> "The appellant's remedy in regard to the temporary injunction was by way of motion to dissolve under the provisions of § 1052, Title 7, Code 1940, and if the ruling was adverse to appeal therefrom as provided by § 757, Title 7, Code 1940." *Brooks v. Everett*, 271 Ala. 380, 384, 124 So. 2d 100.

See also: *WGOK, Inc. v. WMOZ, Inc.*, 275 Ala. 264, 265, 154 So. 2d 22.

Complainant says that assignment 1 presents nothing for review. We agree.

Complainant says further that because assignment 1 presents nothing for review and is argued in bulk together with assignments 5, 6, 8, and 9, none of the assignments argued in bulk in this group are to be considered.

We are of opinion that all assignments in the second group are related because they depend upon the same legal principles and argument, to wit, that the First and Fourteenth Amendments to the Constitution of the United States do not permit the state to enjoin respondents from picketing on complainant's property, and, therefore, that the court erred in denying the motion to dissolve. Assignment 8 recites:

> "8. The trial court erred in its order of April 1, 1965 denying the Respondents' Motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants' (sic) Verified Bill and Petition. (Transcript pg. 82)."

Assignment 8 asserts that the court erred and states how the court erred. We think it has not been shown that this is a bad assignment, and we will consider it.

For these reasons, the motion to affirm is overruled.

On the Merits.

Respondents argue that the trial court erred in two particulars, first, in determining that it had jurisdiction of the subject matter of the suit.

In support of this argument, respondents cite a number of decisions which hold that under the Labor Management Relations Act as amended, U.S.C.A., Title 29, § 141, et seq., state courts are excluded from jurisdiction over peaceful picketing and that exclusive jurisdiction has been conferred on the National Labor Relations Board. Re-

spondents say that the concerted activity of picketing is subject to control and regulation by the Board, that the Board has assumed jurisdiction of the dispute between these parties in other particulars, and that complainant's only remedy is by bringing the subject matter of the instant suit to the attention of the Board, which has not expressly declined jurisdiction over the activity here enjoined.

In support of this contention, respondents cite *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed 2d 775, 79 S. Ct. 773, in which the court undertook to state the rule of federal pre-emption as follows:

> ". . . . When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. (Citation Omitted) Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.
>
> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . . .
>
> ". . . . . .

". . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. (Citation Omitted)" (3 L. ed 2d at pages 782 and 783)

The last cited case was the second appeal to the United States Supreme Court in the same lawsuit. In the first appeal, 353 U.S. 26, 1 L. ed 2d 618, 77 S. Ct. 607, 609, the court had vacated the judgment of a state court enjoining peaceful picketing of a retail lumber yard. As we understand the opinion on second appeal in 3 L. ed 2d at page 784, the court held that because the ". . . . National Labor Relations Board has not adjudicated the status of the conduct for which the State . . . . seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced."

In opinion on first appeal in 1 L. ed 2d, the court vacated the injunction on authority of two other cases decided the same day; i. e., *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 1 L. ed 2d 601, 77 S. Ct. 598, 609, and *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, 1 L. ed 2d 613, 77 S. Ct. 604.

In *Guss*, the National Board had declined jurisdiction of charges of unfair labor practices brought by the union against an employer. The National Board declined to act, but did not cede jurisdiction to the state agency as authorized by § 10(a) of the National Act. The union filed the same charges with the Utah Labor Relations Board which found that it had jurisdiction and granted relief. When the case reached the United States Supreme Court, that court held that the proviso to § 10(a) is the exclusive means whereby states may be enabled to act concerning the matters which Congress has entrusted to the National

Board: that the activity complained of was an unfair labor practice under the National Act; that, although the National Board had declined to act, it had not ceded jurisdiction in the only authorized way; and, therefore, the state agency was powerless to act.

In *Fairlawn*, a state court enjoined the union from picketing the premises of an employer who operated three meat markets in separated localities, from trespassing upon the employer's premises, and from exerting secondary pressure on the suppliers of the employer. The United States Supreme Court assumed that ". . . . it was obvious that the Board would decline jurisdiction." 1 L. ed 2d at page 615. The writer of the Summary, at page 601 in 1 L. ed 2d, states that the court vacated the judgment granting the injunction on the ground that even if the National Board would obviously decline jurisdiction, the state court had no power to enjoin the union conduct involved because it was of that kind regulated by the National Board. The concluding paragraph of the court's opinion recites:

> "One final point remains to be considered. At two of respondent's stores, located in suburban shopping centers, the picketing occurred on land owned by or leased to respondent, though open to the public for access to the stores. As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact; and 'trespassing upon plaintiff's property' is one of the activities specifically enjoined. Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside the context of petitioner's other conduct we cannot know. The judgment

therefore is vacated and the case remanded for proceedings not inconsistent with this opinion." (1 L. ed 2d at pages 616 and 617)

The instant injunction is ". . . . aimed narrowly at a trespass of this sort . . . ." and the question not presented in *Fairlawn* is presented here. Moreover, as we understand *Fairlawn*, the opinion does not indicate that the picketing on employer's property was carried on in such a manner as to obstruct the customers of the complainant in entering and leaving entrances to the store building.

In a recent case, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, —— U.S. ——, 20 L. ed 2d 603, 88 S. Ct. ——, decided May 20, 1968, the court reversed a judgment of the Supreme Court of Pennsylvania enjoining peaceful picketing in a shopping center. The United States Supreme Court said:

> ". . . . All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' March v. Alabama, 326 US, at 508, 90 L Ed at 269, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (20 L. ed 2d at pages 612 and 613)

Although complainant avers in its bill that it operates "a shopping center," we do not think that the findings of the trial court justify the conclusion that complainant's premises are a shopping center such as the one in *Logan Plaza* where the perimeter of Logan Valley Mall was a little less than 1.1 miles; the Mall contained two commercial enterprises, Weis Markets and Sears, Roebuck and Co. at the time of trial; and fifteen other commercial es-

tablishments were situated in the shopping center when the opinion was delivered. See Note 8, 20 L. ed 2d 611. Neither do we understand that the trespass was such that the picketing obstructed customers entering or leaving the store.

In the case at bar, as we understand it, the correctness of the trial court's findings is not challenged. The court found:

> ". . . that a labor dispute exists between the Complainant, Weinacker's Inc., the employer, and the Respondents, Clifford Taggart, Riley Hobbs, James Stuckey and Retail Clerks Union, Local 458 of Mobile, that the Respondent, Retail Clerks Union, Local 458 of Mobile, of which the other Respondents are members, has been certified by the National Labor Relations Board as a bargaining representative for the employees of the Complainant, that numerous differences have existed and do now exist between the Complainant and parties Respondent over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the Respondent Union called a strike which is now in progress. Picket lines have been established by the Union on both of the public sidewalks of the City of Mobile immediately adjacent to the public streets and adjoining the real property of the Complainant on which its storebuilding is located and its business is conducted. Complainant, Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building, which is set-back from the public street on the east and on the south, which building and premises are under the single ownership of the Complainant. The main entrance to said building fronts on the public street (Government Street) to the south. Across Catherine Street (a public street)

to the east. Complainant operates an automobile service station. South of the front of Complainant's storebuilding and between it and the public street, complainant maintains a motor vehicle parking area for the use and convenience of its customers in parking their automobiles while in and about their business with the Complainant, and Complainant also maintains private walkways over its premises leading up to its storebuilding, and sidewalks around its storebuilding. Picketing was first carried on by the Respondents on the public sidewalks of the City of Mobile and later on the sidewalks on the Complainant's premises and in front of the entrances to Complainant's storebuilding. While this picketing on Complainant's premises and in front of the entrances to its building has been without any acts of actual violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of the Complainant in entering and leaving the entrances to said building on the south or Government Street side thereof. Said picketing in the manner heretofore described continued after the Complainant, through one of its officials, had requested the Respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of Complainant's premises to the public sidewalks of the City of Mobile adjoining the same. This Court's Writ of Temporary Injunction restrained and enjoined the Respondents, their agents, servants, employees and any and all persons acting in concert with them from trespassing upon the real property of the Complainant and from interferring (sic) with its property and the right of ingress and egress thereto."

In support of their contentions, respondents cite the following cases which we here number for reference below:

(1) *Toomer* v. *Local No. 995, IBEW*, (La. App.), 131 So. 2d 248; (2) *Barksdale and LeBlanc* v. *Local No. 130, IBEW*, (La. App.), 143 So. 2d 770; (3) *Broadcast Service of Mobile, Inc.* v. *Local 1264, IBEW*, 276 Ala. 93, 159 So. 2d 452; (4) *Maryland* v. *Williams*, 44 LRRM 2357, 37 Labor Cases, ¶ 65,708; (5) *Marsh* v. *Alabama*, 326 U.S. 501, 90 L. ed 265, 66 S. Ct. 276; (6) *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 363 P. 2d 803; (7) *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union*, 40 Cal. Rptr. 233, 394 P. 2d 921.

Three elements exist in the instant case to distinguish it from the cited cases; to wit, here, the injunction is sought and granted so that the trespass is narrowly enjoined;[1]

---

[1] The petition for immediate relief recites:

"O N E

"On January 21, 1965 this Honorable Court issued a fiat to the named Respondents ordering the request for an injunction to be set for a hearing at 9:30 Monday, January 25, 1965.

"T W O

"After receiving this notice actual or constructive, the Respondents [Clifford Taggart & Riley Hobbs (in ink)] have proceeded to constantly trespass upon the Complainant's property by marching or parading back and forth to the immediate doorway of the Complainant's place of business. Your Petitioner alleges that this conduct has been more intensive since the Court entertained the Complainant's petition and set the cause for hearing as described above and that such action on the part of the Respondents are at this time causing an irreparable injury to the Complainant in that the actions of the Respondents constitute obstructing customers from entering and leaving the Complainant's place of business and the Complainant alleges that the acts are outside the realms of peaceful picketing and constitute an immediate invasion of his property and his property rights contrary to the laws of the State of Alabama and the Constitution of the United States of America.

"T H R E E

"Your Complainant alleges that it is necessary to receive immediate injunctive relief to enjoin the continuous obstruct-

the trespass is on the premises of a single store owner; and the trespass obstructed customers using the entrances to the store. In none of the cited cases is the injunction so narrowly sought or granted.

In (1), the opinion indicated that the only witness testifying as to obstruction of access to the job site said that "his way was not blocked." 131 So. 2d at 252. In (2), it appears that there was no obstruction of entrances.

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ing of the doorway to the Complainant's shopping center and that the Petitioner has no adequate remedy at law other than the facilities of this Honorable Court by enjoining the Respondents from such acts.

"FOUR

"Your Complainant respectfully prays that this Honorable Court issue a temporary writ of injunction after requiring the Complainant to enter into a bond with good and sufficient sureties as required by this Honorable Court.

"WHEREFORE, your Petitioner respectfully prays that the allegations of the Petition filed in this Court in this original cause as of January 21, 1965 be adopted and made a part hereof and that this Honorable Court forthwith order the Respondents and agents, servants or employees [and any and all persons acting in concert with (in ink)] from trespassing upon the property of the Complainant and from further interfering with the Complainant's property and right of ingress and egress to the Complainant's property and place of business and grant unto the Complainant all other fit and proper relief that the Complainant might be entitled to and shows unto the Court that an irreparable injury will result unless this Honorable Court grant the relief as so prayed."

The command of the writ of injunction is:

"These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from—TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS until the further orders of this Court. And this you will in no wise omit under penalty, &c."

and the picketing was not on property owned by or under control of the plaintiffs, and this is the case also in (3). In (4), the picketing was on the walkways of a shopping center which covered 46 acres with over 50 tenants, and picketing did not obstruct entrances. In (5), the activity was on the sidewalk of a company town and no obstruction was involved. In (6), the picketing was in a shopping center in which there were "numerous stores, banks and other enterprises," 363 P. 2d 803. Apparently the picketing was on the shopping center street and no entrance was obstructed. In (7), picketing was on sidewalks in a shopping center, and, also, so far as appears, without obstruction of entrances.

The court seems to justify the decision in *Logan Valley Plaza* on the conclusion that the shopping center streets had become quasi-public streets and the pickets would be disadvantaged if confined to the public streets outside the Mall. The premises of the instant complainant are not shown to have acquired the character of a town or business block as in *Marsh* and disadvantage to the pickets is not shown. Moreover, obstruction of customers using store entrances is present here but not in the cases cited by respondents.

It would be tempting to dispose of this case by saying that, because no person has suffered bodily assault or injury as a result of the activity here enjoined, the state court has no jurisdiction, but it appears to be our duty to dispose of the case the hard way as the reader of this opinion must have realized by now.

It is true that the evidence does not show that a blow has been struck or any blood shed, and, by some standards, the trespass or picketing may be described, perhaps correctly, as peaceful. The obstruction of a person's use of an entrance to a building by the presence of another person, however, can be accomplished only by using, or

threatening to use, physical force in some degree, large or small, depending on the restraint with which the persons involved govern their actions. Such obstruction can easily and quickly escalate into an affray which, even in the loose meaning of today's popular speech, cannot be properly called a peaceful affair.

Aside from the threat of violence which may be provoked by obstructing entrances, two cases support the conclusion that state jurisdiction over the trespass here enjoined has not been ousted. In *Moreland Corp. v. Retail Store Employees Union*, 16 Wis. 2d 499, 114 N. W. 2d 876, decided in 1962, the owner of a shopping center sought an injunction against picketing on a sidewalk in a shopping center. In deciding the issue of jurisdiction, the court said:

> ". . . . Even assuming the presence of the necessary federal jurisdictional requirements, the question of whether a state court may enjoin picketing as a trespass, in spite of arguable federal labor law pre-emption in other respects, has been expressly left open by the United States supreme court. *Amalgamated Meat Cutters & Butcher Workmen, Local No. 427, A.F.L. v. Fairlawn Meats, Inc.* (1957), 353 U.S. 20, 77 Sup. Ct. 604, 1 L. Ed. (2d) 613. We conclude that the courts of Wisconsin do have subject-matter jurisdiction to determine a controversy involving an alleged trespass by agents of a labor union. . . . .
>
> ". . . . . .
>
> "The issue is whether the respondent, because it has designed its private property for use as a shopping center, has lost its right to ban otherwise lawful picketing. If the record before us clearly established that the property involved is a multistore shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a

conclusion that the property rights of the shopping-center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing. See *Freeman* v. *Retail Clerks Union Local No. 1207, supra* (concurring opinion). See also Notes, 19 Duke Law Journal, 310; Note, 73 Harvard Law Review, 1216, and Note, 10 Stanford Law Review, 694. Compare, *Marsh* v. *Alabama* (1946), 326 U.S. 501, 66 Sup. Ct. 276, 90 L. Ed. 265, in which the United States supreme court held that the freedom of religion guaranteed by the First and Fourteenth amendments prevented the enforcement of a criminal-trespass statute against a person distributing religious pamphlets on the sidewalk of a company-owned town. See also *National L. R. Board* v. *Babcock & Wilcox Co.* (1956), 351 U.S. 105, 76 Sup. Ct. 679, 100 L. Ed. 975, a decision under the National Labor Management Relations Act involving the right of labor union representatives to circulate literature in an employer's private parking lot. . . . .

"In weighing the parties' conflicting interests of private property and free speech, we would want to know the physical characteristics of the shopping center so that our decision on this important policy question could be applied with clarity to other disputes which might arise. On the record before us, the precise nature of the shopping center is not fully disclosed. There are *some* details in the pleadings and in the affidavits; also, the photograph of the store in question is in the record. However, we conclude that the record presents an insufficient basis upon which to enter a summary judgment for the appellants. There being material facts in issue which necessitate a trial, the trial court properly denied the appellants' motion for summary judgment." (16 Wis. 2d at pages 503, 505, and 506)

Moreland is cited by the Supreme Court of the United States in Note 15 of the opinion to support the conclusion of the court in *Logan Valley Plaza*.

In *Hood v. Stafford*, 213 Tenn. 684, 278 S. W. 2d 766, decided in 1964, there was a history of proceedings before the National Labor Relations Board. The opinion recites:

> "Prior to the sale of the Weingarten stores, this union had sought to organize the employees of Pic-Pac. As a result of this effort, the National Labor Relations Board held an election on October 4, 1961 for the purpose of determining whether the employees of Pic-Pac desired the union to represent them as bargaining agent. At this election, 19 out of 90 votes cast were in favor of representation by the union. The election was contested and, as far as the record shows, that matter was still pending before the N.L.R.B., at the time of the trial of this case in the Circuit Court.
>
> "It further appears that there are also two other matters which at the time of trial were undisposed of before the N.L.R.B. One pertains to the dismissal on September 16, 1961 by Pic-Pac of two employees, and the other relates to Weingarten and its handling of the sale to Pic-Pac and its discharge of its employees. Unfair labor practice charges were filed by Pic-Pac with the N.L.R.B., with reference to the activity in question in this case. These charges were dismissed by the Board and no complaint was issued." (378 S. W. 2d at pages 767 and 768)

A picket had been arrested and convicted for violating a city ordinance by her picketing which is described as follows:

> "The defendant and other pickets were on the parking area of the Pic-Pac Store at Highland and Summer,

> They were wearing placards, distributing circulars, and soliciting prospective customers, seeking to persuade these members of the public not to trade with Pic-Pac. At times defendant and others walked back and forth in front of the door to the store, which defendant estimated to be 200 to 300 feet from the public sidewalk. At other times defendant was out in the parking area of the parking lot. The prosecutor testified that at times it was necessary for customers to step around the defendant and another picket in order to get in the door to the store. He stated that about one-third of those approaching the door turned away and did not enter the store after being approached by the defendant or another picket. The defendant stated she could not estimate the number of persons who turned around and left the premises as a result of her activities. She was asked to leave the premises before being arrested." (378 S. W. 2d at page 768)

The Tennessee Court held that state jurisdiction had not been ousted, saying, among other things:

> "Probably the most direct authority dealing with the questions presented in the petition for certiorari is People v. Godufo, 21 Ill. 2d 605, 174 N. E. 2d 385 (1961), in which the defendants were convicted in the Chicago Municipal Court of criminal trespass. The defendants entered the parking area of a Sears, Roebuck store for the purpose of distributing union leaflets and questionnaires to employees of the store. The superintendent asked them to leave the premises several times but defendants refused. He then had them arrested. The question of whether or not federal legislation had divested the state courts of power to deal with the activity involved was presented. The Supreme Court of Illinois affirmed the judgment of the Municipal Court. The United States Supreme Court denied certiorari without comment in 368 U.S.

927, 82 S. Ct. 361, 7 L. Ed. 2d 190. The Illinois Court, in that case, recognized that when an activity is protected by Section 7, or prohibited by Section 8, of the National Labor Relations Act, the state must abstain from regulation and, further, that when the activity is arguably subject to Section 7 or Section 8 of the Act, the states must yield to the primary jurisdiction of the National Labor Relations Board. The Court then stated:

> "'The defendants have made much of the fact that there was no violence in this case. We believe, however, that this was due to the fact that the company did not resort to self-help to remove defendants from the premises. The defendants were on property occupied by Sears, Roebuck and Company. The company's agent believing the defendants had no right to be on the property ordered them to leave three times. The defendants believing they had a right to be there refused to leave. At this point the company called the police. If the State had not taken charge of the situation, the company would have had no alternative but to forceably remove the defendants. We cannot know the amount of force that would have been necessary to remove them, but the threat of violence in such a situation is imminent. See e. g., Marshall Field & Co. v. National Labor Relations Board, 7 Cir., 200 F. 2d 375.
>
> "'.....'" (378 S. W. 2d at pages 769 and 770)

The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not reasonably arguable that the Congress intended to exclude the states from jurisdiction over trespass by picketing on privately owned property, which does not have the quasi-public

character of a town street or business block, in a manner so as to obstruct entrances to a store.

We hold that the trial court in the instant case did not err in deciding that it had jurisdiction.

The respondents say, in their second particular, that the court erred in enjoining their union picketing activity because they have a constitutional right to picket peacefully as an exercise of freedom of speech. Without further lengthening this opinion, we hold that the court did not err in this respect because picketing involves something more than free speech, and because the right to picket must be balanced against the right of the owner to use his property in a lawful manner and the interest of the state in restraining trespass which is a potential cause of violence. So far as this record discloses, picketing on the streets abutting complainant's store lot is not materially less effective than picketing on the lot itself.

AFFIRMED.

Livingston, C. J., and Simpson and Kohn, JJ., concur.

APPENDIX B

Judgment of the Supreme Court of Alabama

SUPREME COURT OF ALABAMA —THURSDAY, SEPTEMBER 19, 1968

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, MERRILL, COLEMAN AND HARWOOD. ASSOCIATE JUSTICE KOHN NOT PRESENT.

1st Div. 295

CLIFFORD TAGGART, ET AL.

v.

WEINACKER'S, INC., a Corp.

MOBILE CIRCUIT COURT, IN EQUITY

Come the parties by attorneys and the record and matters therein assigned for errors being argued and submitted on motion and merits and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decree of the Circuit Court be in all things affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the appellants, Clifford E. Taggart and Retail Clerks' Union Local No. 458, and Reliance Insurance Company, surety for the costs of appeal, pay the costs accruing on said appeal in this Court and in the Court below, for which costs let execution issue.

APPENDIX C

Opinion and Judgment of the Circuit Court of Mobile County, Alabama, in Equity

ORDER OF COURT

THIS CAUSE BEING FIRST DULY SET CAME ON TO BE HEARD by the Court on the 26th day of March, 1965, on the Respondents' Motion to Dissolve the Temporary Writ of Injunction heretofore issued by the Court and to Dismiss Complainant's Bill, and was submitted at the conclusion of the hearing, on Complainant's Verified Bill of Complaint and Verified Petition for Immediate Injunctive Relief, together with the thereto attached affidavits, and the Respondents' Verified Answer thereto and Motion to Dissolve the Temporary Injunction and to Dismiss said Bill and Petition, and the Court having fully considered the matter, finds that a labor dispute exists between the Complainant, Weinacker's Inc., the employer, and the Respondents, Clifford Taggart, Riley Hobbs, James Stuckey and Retail Clerks Union, Local 458 of Mobile, that the Respondent, Retail Clerks Union, Local 458 of Mobile, of which the other Respondents are members, has been certified by the National Labor Relations Board as a bargaining representative for the employees of the Complainant, that numerous differences have existed and do now exist between the Complainant and parties Respondent over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the Respondent Union called a strike which is now in progress. Picket lines have been established by the Union on both of the public sidewalks of the City of Mobile immediately adjacent to the public streets and adjoining the real property of the Complainant on which its storebuilding is located and its business is conducted. Complainant, Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building, which is set-back from the public

street on the east and on the south, which building and premises are under the single ownership of the Complainant. The main entrance to said building fronts on the public street (Government Street) to the south. Across Catherine Street (a public street) to the east, Complainant operates an automobile service station. South of the front of Complainant's storebuilding and between it and the public street, complainant maintains a motor vehicle parking area for the use and convenience of its customers in parking their automobiles while in and about their business with the Complainant, and Complainant also maintains private walkways over its premises leading up to its storebuilding, and sidewalks around its storebuilding. Picketing was first carried on by the Respondents on the public sidewalks of the City of Mobile and later on the sidewalks on the Complainant's premises and in front of the entrances to Complainant's storebuilding. While this picketing on Complainant's premises and in front of the entrances to its building has been without any acts of actual violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of the Complainant in entering and leaving the entrances to said building on the south or Government Street side thereof. Said picketing in the manner heretofore described continued after the Complainant, through one of its officials, had requested the Respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of Complainant's premises to the public sidewalks of the City of Mobile adjoining the same. This Court's Writ of Temporary Injunction restrained and enjoined the Respondents, their agents, servants, employees and any and all persons acting in concert with them from trespassing upon the real property of the Complainant and from interfering with its property and the right of ingress and egress thereto.

Upon the Court's hearing of the Motion to Dissolve and the Temporary Injunction and to Dismiss Complainant's Bill of Complaint and Petition, the Respondents contended that the picketing in question on Complainant's real property arose out of and is the subject of a labor dispute existing between the Complainant and the Respondents and that by reason thereof, the National Labor Relations Board has sole jurisdiction of the subject matter in controversy, that is, to determine the right to peacefully picket, or, not right to peacefully picket on Complainant's premises, to the exclusion of the jurisdiction of the State Courts, because Congress, by the passage of the National Labor Relations Act, as amended, 29 USC, Section 151 et seq., has pre-empted the State Courts' jurisdiction and vested it in the National Labor Relations Board, and also that the Respondents are within their legal rights in peacefully picketing Complainants place of business by going on its property and on to the sidewalks of the Complainant, because this activity is protected by said Labor-Management Relations Act, as amended, 29 USC, Section 141, et seq., and the First and Fourteenth Amendments to the Constitution of the United States.

Complainant contends that, notwithstanding no affrays have occurred, the Respondents have committed actual trespass on Complainant's private property and that their acts generate actual violence and are in violation of both the civil and criminal laws of this State, and hence, cannot be carried on in a peaceful atmosphere or surrounding, and also, that while picketing may be carried on for a lawful purpose, such may not be done in an unlawful manner.

Therefore, the first question in this case is whether or not the State Courts have jurisdiction to hear it. And, the second question is whether or not, if the State Courts do have jurisdiction of the subject matter, the Respondents' activities, complained of by the Complainant, are the subject of injunctive relief.

This Court has read the briefs submitted by counsel for the respective parties and the reported decisions contained therein and having fully understood and considered the matter, the Court is of the opinion and recognizes that when the activity is arguably subject to Section 7 and 8 of the National Labor Relations Act, the State Court is divested of jurisdiction and must yield to the primary jurisdiction of the National Labor Relations Board, and, generally, the "Pre-emption Doctrine" to bar actions by State Courts under State law is applied where peaceful picketing is carried on on a public street on a privately owned street or parking area which has lost its identity as such and partakes "of the nature of a city street".

But, where a storeowner invites prospective customers to come to his store to trade and to park on his grounds made available therefor while doing business with the storeowner, the invitation is for one particular purpose, not for *any* purpose to the general public, and the use of the storeowner's parking lot and sidewalks is of a purely private character over which the State Courts retain jurisdiction to hear suits seeking injunctive relief to bar trespassing. Hood vs. Stafford, 378 SW 2nd, 766.

The Court is of the further opinion that under the facts of this case, it was unlawful for the Respondents to trespass on the Complainant's premises by picketing, after being requested to leave. Freedom of speech, guaranteed to the Respondents by the First and Fourteenth Amendments to the Federal Constitution, did not give them the right to remain on the parking area and sidewalks of the Complainant after they were ordered to leave.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED by the Court that this Court does have jurisdiction of the subject matter involved in this suit which has not been divested by the National Labor Relations Act.

It Is Further Ordered, Adjudged and Decreed by the Court that the Respondents, by going on the Complainant's premises for the purpose of picketing the Complainant's storebuilding, were trespassers, and were employing an unlawful means of exercising their right to picket and that their activity in this respect is subject to injunctive relief by a State Court of Equity.

It Is Further Ordered, Adjudged and Decreed by the Court that Respondents' Motion to Dissolve the Writ of Temporary Injunction heretofore issued by this Court and to Dismiss the Complainant's Verified Bill and Petition be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed by the Court that the Writ of Temporary Injunction heretofore issued by this Court be and the same is hereby continued until ordered dissolved by due process of law.

Ordered, Adjudged and Decreed at Mobile, Alabama, this 1st day of April, 1965.

Daniel T. McCall, Jr.
Judge

APPENDIX D

Writ of Injunction

CIRCUIT COURT OF MOBILE COUNTY

IN EQUITY

THE STATE OF ALABAMA /
MOBILE COUNTY /

To Any Sheriff of the State of Alabama Greeting:

WE COMMAND YOU, That, without delay, you execute this writ, and due return thereof how you have executed the same make to us.

To CLIFFORD TAGGART, RILEY HOBBS, JAMES SECKEY, INDIVIDUALLY & AS PRESIDENT OF RETAIL CLERKS' UNION, LOCAL 458 OF MOBILE; RETAIL CLERKS' UNION LOCAL 458 OF MOBILE.

WHEREAS WEINACKER'S INC., ETC. has this day filed its ORIGINAL Bill of Complaint in said Court against CLIFFORD TAGGART, RILEY HOBBS, JAMES SECKEY, INDIVIDUALLY & AS PRESIDENT OF RETAIL CLERKS' UNION, LOCAL 458 OF MOBILE, RETAIL CLERKS' UNION LOCAL 458 OF MOBILE praying, among other things, that THE ABOVE RESPONDENTS AND AGENTS, SERVANTS OR EMPLOYEES AND ANY AND ALL PERSONS ACTING IN CONCERT WITH BE RESTRAINED AND ENJOINED FROM TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS.

AND WHEREAS, on said Bill being exhibited to the Hon. DAN T. MCCALL, JR. a Judge of the Circuit Court of Mobile County, Alabama, on the 22nd day of January A.D., 1965, he did order that upon Complainants entering into Bond with security in the sum of TWO THOUSAND & no 100 ($2,000.00) — Dollars, payable to and approved by the Register of this Court, and conditioned according to law, a Writ of Injunction issue out of said Court according to

the prayer of said Bill: And Whereas bond has been given and approved as required by said order.

These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS, until the further orders of this Court. And this you will in no wise omit under penalty, &c.

WITNESS, W. Elsworth Hathorn, Register of the Circuit Court of Mobile County, Alabama, Equity Side, this 22nd day of January A.D. 1965.

W. ELSWORTH HATHORN
Register of the Circuit Court
of Mobile County, Alabama

APPENDIX E

Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, Et Seq.)

SEC. 2. When used in this Act

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in

negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work

on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to

refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce

any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b).

* * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~1210~~ 74

CLIFFORD TAGGART, ET AL.,
Appellants,

vs.

WEINACKER'S, INC.,
Appellee.

REPLY BRIEF TO BRIEF FILED IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1210

CLIFFORD TAGGART, ET AL.,
Appellants,

vs.

WEINACKER'S, INC.,
Appellee.

REPLY BRIEF TO BRIEF FILED IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

ADDITION TO STATEMENT OF FACTS

The order of the trial court granting the temporary injunction in this case is set out in Appendix D at page 29a of the Appendix to the Petition for Certiorari, the following is the verbatim enjoining part of the order:

> "These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from—TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT *AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY*

AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS; until the further orders of this Court. And this you will in no wise omit under penalty, &c."

It is significant to note that the Court did not enjoin peaceful picketing of the premises, but merely enjoined trespassing upon the property of the Complainant and enjoined further interference with the Complainant's property and *right of ingress and egress and to the Complainant's property or place of business until the further orders of this Court.*

After the hearing on the merits was held the trial judge wrote a lengthy opinion (Appendix C at page 23a through 27a of the Petition for Certiorari). In this opinion is the finding of fact (Appendix C at page 24a of the Petition for Certiorari) that the picketing

> ". . . has been carried on in such a manner as to obstruct the customers of the Complainant in entering and leaving the entrances to said building on the south or Government Street side thereof."

BRIEF OF ARGUMENT AND REASONS FOR DENYING WRIT

In the case of *Youngdahl* v. *Rainfair*, 355 U.S. 131, 2 L.Ed.2d 151; 78 S.Ct. 206, this Court in affirming a portion of the injunction order of an Arkansas Court says at p. 157 of 2 Lawyers' Edition Second Series as follows:

> "Accordingly, insofar as the injunction before us prohibits petitioners and others cooperating with them . . . from obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business, and the free ingress and egress to and from that property, it is affirmed."

It would therefore appear that on the basis of the *Youngdahl* v. *Rainfair* case that the portion of the Court's injunction order which enjoined the Respondent-Appellants

> "from further interfering with the Complainant's property and right of ingress and egress to the Complainant's property and place of business, ..."

was proper.

We should further like to point out that in the case of *Food Employees* v. *Logan Valley Plaza*, the opinion relied on by Appellants, the following statement by Mr. Justice Thurgood Marshall in Headnotes 8, 9, page 613 of 20 L. Ed.2d:

> "Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use of which the property is ordinarily put by the State. Thus we have upheld a *statute prohibiting picketing 'in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses'*. Cameron v. Johnson, 390 U.S. 611, 616, 20 L.Ed.2d 182, 187, 88 S.Ct. 1335."

It would therefore appear to Appellee that since the trial court found as a fact that the picketing was obstructing the ingress and egress to and from private premises even though the premises are those which the public is invited to come upon to trade, that the activity of obstructing the free ingress and egress is sufficiently reprehensible so as to destroy the implied invitation to come upon such property and to render the perpetrators of such acts trespassers after such perpetrators have been requested to desist and leave the premises.

As to the pre-emption question we submit as our Proposition of Law No. 1 which is based on six Sub-propositions of Law as follows:

Appellee submits that the only real issue insofar as the merits of this case are concerned is whether or not the State Court retains jurisdiction to enjoin trespassers by a labor union in connection with a labor dispute or whether this right has been pre-empted by acts of Congress or decisions of the Supreme Court of the United States.

Appellee submits that once this Court determines that the State Court had jurisdiction, then the remaining question as to whether or not an injunction was properly issued is strictly a factual one. The State of Alabama Supreme Court has previously held that the State Courts have the power to enjoin continuing trespasses against real property. The State of Alabama Supreme Court has likewise held that the grant or refusal of a temporary injunction rests in the sound discretion of the trial court, subject to being disturbed upon appeal only for abuse of discretion.

As we have stated heretofore in this brief our Proposition of Law No. 1 is a Proposition of Law which is made up from a number of recent Federal and State cases. We have set out the cases upon which we base this Proposition of Law as 6 Sub-propositions of law covering the most recent decisions of the Supreme Court of the United States, the State of Alabama, and the Supreme Courts of other states. Our Composite Proposition of Law No. 1 is to the effect that:

> "The State Court's jurisdiction to enjoin trespasses by a labor union even in connection with a labor dispute has not been pre-empted by acts of Congress or decisions of the Supreme Court of the United States."

In support of this proposition of law we should now like to examine our 6 Sub-propositions of Law and we refer the

court's attention to our Sub-proposition of Law No. A in support of Proposition of Law No. 1 under which we cite the cases of *Garner* v. *Teamsters, etc., Union*, 346 U.S. 486, 74 S.Ct. 161, 98 L.Ed. 228, and *International Brotherhood of Teamsters Local 695, AFL,* v. *Vogt, Inc.*, (1957) 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347.

First we refer the court's attention to the case of *Garner* v. *Teamsters, etc., Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, where we find the following language:

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

In the later case, which summarizes a number of prior Supreme Court decisions, of *International Brotherhood of Teamsters Local 695, AFL,* v. *Vogt, Inc.*, (1957) 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347, Mr. Justice Frankfurter says on page 291 of 354 U.S. or at page 1169 of 77 Supreme Court Reporter the following:

> "The implied reassessments of the broad language of the Thornhill case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid State policy in a domain open to State regulation."

Based upon these two quoted statements we submit that our Sub-proposition of Law No. A to the effect that the National Labor Management Relations Act has not preempted the entire field of labor relations and much is left to the States is a correct proposition of law.

Our Proposition of Law No. B in support of Proposition of Law 1 is taken from the statement last hereinabove quoted from Vogt. In this regard we would also like to refer the court's attention to the case, *Hughes* v. *S. Ct. of Calif.*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985, and to the following statement appearing on page 992 of 94 Law Edition:

> "However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * * A State is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."

This brings us to a consideration next to the question of whether or not a trespass is an unfair labor practice under the National Labor Management Act. We find one case which has specifically construed this question and has arrived at the conclusion that picketing which constitutes a trespass is not an unfair labor practice under the National Labor Management Act. We refer the court's attention to the District Court decision of *Your Food Stores* v. *Retail Clerks Local 1564*, 124 F. Supp. 697, where the court said at page 700 of 124 Federal Supplement that the second question involved for decision was

> "Second, is the matter of trespass by Unions, not enumerated as an unfair labor practice in either Section 158, Title 29, U.S.C.A., or in any other section of the Labor Management Act, subject to litigation in the State Court?"

On page 701 the court said as follows:

> "Turning to the second question, we must first determine whether picketing, as a trespass, is an unfair labor practice within the ambit of the Act. A word-by-word examination of Section 158, Title 29, U.S.C.A., 'Unfair labor practices', fails to disclose that picketing, as a trespass is an unfair labor practice. Not being listed as such, the question remains as to whether picketing is a trespass, and whether it may be enjoined as such, and should be the subject of adjudication by the state court.
>
> "This question is, the Court believes, one of the first impression, as no cases in direct point were cited by parties, and none has been found by the Court. Certain enunciations have been made in cases which throw considerable light on the question, however.
>
> "In *United Construction Workers Affiliated with United Mine Workers of America* v. *Laburnum Construction Company*, 347 U.S. 656, 657, 74 S.Ct. 833, it was decided that the Labor Management Relations Act did not deprive a State Court of jurisdiction to try a case filed for damages against three labor unions in a common-law tort action. In that case, the action relied on as having been committed by defendants, were also unfair labor practices within the Act. The alleged trespass in the instant case is likewise a tort, and is not an enumerated unfair labor practice.
>
> "The case of *Garner* v. *Teamsters, etc., Union*, 346 U.S. 485, 74 S.Ct. 161, while fully supporting the previous opinion and judgment in the case at bar, contains the following language, to the effect that the Act has not pre-empted for the Board, the entire field of employer-employee relations in commerce:
>
> > " 'The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting

indications of congressional will the area in which state action is still permissible.

" 'This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is "governable by the State or it is entirely ungoverned." In such cases we have declined to find an implied exclusion of state powers. International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 254, 69 S.Ct. 516, 521, 93 L.Ed. 651. Nor is this case of mass picketing, threatening of employees, obstructing streets and highway, or picketing homes. We have held that the state still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways." Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740, 749, 62 S.Ct. 820. 825, 86 L.Ed. 1154." 346 U.S. at page 488, 74 S.Ct. at page 164.'

"A case which points strongly to the conclusion that plaintiff Food Stores may litigate its issues in the state court, is that of International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S.Ct. 516, 521, 93 L.Ed. 651. Here negotiations between the employer, Briggs & Stratton Mfrg. Co., and the union on a collective bargaining agreement, became deadlocked. The union, instead of striking, called a series of unannounced union meetings at different hours of the day. Twenty-seven stoppages in five months, in fact, occurred. The Supreme Court of Wisconsin sustained the Wisconsin Board's 'cease and desist order' to the union on certiorari to the Supreme Court. That tribunal, through Mr. Justice Jackson, affirmed the Wisconsin Court. Two excerpts from the opinion of the Supreme Court are of value, here:

> "It seems to us clear that this case falls within the rule announced in Allen-Bradley that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the Federal Board.' There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned.
>
> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effect on that interstate commerce which Congress may regulate. National. Labor Relations Board v. Jones & Laughlin. 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893; Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234."

In the case of *Local 612 International Brotherhood of Teamsters* v. *Bowman Transportation, Inc.*, 165 So.2d 113, 115 the court says under Headnote 3:

> "Peaceful picketing is not to be enjoined in Alabama *unless it is done in an unlawful manner* or for an unlawful purpose."

We have paraphrased this statement to get our subproposition D in support of our Proposition of Law No. 1 to the effect that where peaceful picketing is done in an unlawful manner it may be enjoined.

Next we should like to refer the court's attention to our Sub-proposition of Law E in support of our Proposition of Law No. 1 wherein we state:

> "As recently as 1957 the United States Supreme Court did not consider that Federal laws pre-empted the field of law involving labor activities by Labor Unions so as to include the field of trespass."

This Proposition of Law is based upon the statement of the Supreme Court in *Amalgamated Meatcutters & Butchers Workmen of North America* v. *Fairlawn Meats*, 353 U.S. 20, 77 S.Ct. 604, 1 L.Ed.2d 613, page 616, where the court states:

> "One final point remains to be considered. At two of respondent's stores, located in suburban shopping centers, the picketing occurred on land owned by or leased to respondent though open to the public for access to the stores. As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact, and 'trespassing upon plaintiff's property' is one of the activities specifically enjoined. Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous promise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know."

The Supreme Court went on to reverse the lower court but instead of rendering the decision remanded the case for further proceedings in the lower court. Apparently this action was taken for the lower court to determine whether or not it should narrowly enjoin the activity of trespass as otherwise the Supreme Court would have rendered the decision. This conclusion is reached because otherwise

there would have been no point in remanding the case to the State Court for further proceedings. Not only is this our conclusion from the above statement but we should also like to refer the court's attention to a statement of the Wisconsin Supreme Court in the case of *Moreland Corporation* v. *Retail Store Employees Union, Local No. 444*, (1962) 16 Wis.2d 499, 114 N.W.2d 876, 878, where the court said as follows:

> "However, we are of the opinion that the circuit court does have subject matter jurisdiction and may enter a valid judgment determining the controversy. Even assuming the presence of the necessary federal jurisdictional requirements, the question of whether a state court may enjoin picketing as a trespass, in spite of arguable federal labor law pre-emption in other respects, has been expressly left open by the United States Supreme Court. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL v. Fairlawn Meats, Inc. (1957), 353 U.S. 20, 77 S.Ct. 604, 1 L.Ed.2d 613. We conclude that the courts of Wisconsin do have subject matter jurisdiction to determine a controversy involving an alleged trespass by agents of a labor union."

This statement of the Wisconsin Supreme Court is quoted on page 770 of the opinion of the Supreme Court of Tennessee in *Hood* v. *Stafford*, 378 S.W.2d 766, 770. This statement is likewise made in *Freeman* v. *Retail Clerks Union*, 45 LRRM 2334, 2335. The Washington Superior Court, King County, makes the following statement on page 2335 of 45 LRRM:

> "Amalgamated Meatcutters & Butcher Workmen of North America v. Fairlawn Meats, 353 U.S. 20, 1 L.Ed.2d 613, 39 LRRM 2571, stands for the proposition that the United States Supreme Court as recently as March 25, 1957, did not consider that Federal laws preempted the field of law involving labor activities by

labor unions so as to include the issue of trespass. In the absence of a clear judicial determination that such matters are specifically delegated to the Federal government, the plain language meaning of the Tenth Amendment to the United States Constitution controls. Residual judicial powers belong to the people or to the states and their duly-constituted state courts.

"POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Our Sub-proposition of Law F which is our last sub-proposition in support of our Proposition of Law No. 1 is based upon the following statement on page 768 of 378 S.W.2d Reporter, in the case of *Hood* v. *Stafford* where the court quotes from the Court of Appeals of the State of Tennessee's decision as follows:

"Neither the decisions of the Supreme Court of the United States nor the Acts of Congress, have, in our opinion, however, *undertaken to* authorize, even in labor disputes, trespassing on private property."

To like effect is the ruling of the Wisconsin Supreme Court in *Moreland Corporation* v. *Retail Store Employees Union, Local 444*, (1962) 16 Wis.2d 499, 114 N.W.2d 876. To the same effect is *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 685 (100 L.Ed. 975). See also *People* v. *Goduto*, 21 Ill.2d 605, 174 N.E.2d 385.

Based upon the foregoing authorities we submit that our Proposition of Law No. 1 correctly states the law that a state court does have the jurisdiction to enjoin trespasses by a labor union even in connection with a labor dispute, and that such power has not been pre-empted by Acts of Congress or decisions of the Supreme Court of the United States.

Our Proposition of Law No. 2 is based upon the statement in *Hood v. Stafford*, quoting from the Court of Appeals of Tennessee decision at page 769 of 378 S.W.2d Reporter as follows:

> "As to the contention that the parking lot of the Pic-Pac Stores was a quasi public place, it is our opinion that Pic-Pac had invited all members of the public, who were or might be customers of its store, to use its parking lot in connection with business transactions at the store; but, certainly, it had not invited appellee on to its premises, either expressly or impliedly, for the purpose of preventing members of the public from trading with Pic-Pac. The purpose of the implied invitation to the public for use of that lot was for acquiring customers, not for having them enticed away."

It would therefore follow that the property involved was properly subject to trespass by the Union in question.

Our Proposition of Law No. 3 to the effect that:

> "Picketing is not synonymous with free speech and it is subject to regulation by the state if the manner in which it is conducted gives grounds for its disallowance"

is taken from the case of *Hughes v. Superior Court of California*, supra, and the statement upon which this Proposition of Law is based is heretofore quoted in this brief. Appellee therefore submits that the Circuit Court of Mobile County, Alabama, properly had jurisdiction to issue the temporary Writ of Injunction in this matter. We submit that this right has not been pre-empted by decisions of the Supreme Court nor Acts of Congress, nor the constitutional guarantee of free speech.

The only possible questions remaining for this Court to determine are covered by our Propositions of Law Nos. 4 and 5. Our Proposition of Law No. 4 is to the effect

that the courts of the State of Alabama have the right in the exercise of their sound discretion to enjoin repeated or continuing trespasses to land which cause irreparable harm or where the damage sustained thereby is difficult to ascertain. This Proposition is taken from the case of *Lewis v. Hicks*, 264 Ala. 440, 87 So.2d 867, 60 A.L.R.2d 307 (and see cases cited in A.L.R.2d Annotations from Alabama). Our Proposition of Law No. 5 is taken from the Supreme Court of Alabama case of *Prichard v. Wade*, 261 Ala. 156, 73 So.2d 533, where the court says at page 537 of 73 So.2d Reporter and the Headnotes 4 and 5 as follows:

> "4, 5 As a general rule, 'an injunction, whether temporary or permanent cannot . . . be sought as a matter of right, but the power to grant or refuse it lies in the sound discretion of the Court under the circumstances and the facts of the particular case * * *.' 43 C.J.S., Injunctions, § 14, p. 420; Corte v. State, 259 Ala. 536, 542, 67 So.2d 782, 787; City of Mobile v. Farrell, 229 Ala. 583, 587, 158 So. 539. And in the absence of an abuse of discretion the action of the trial court will not be disturbed on appeal."

We therefore respectfully submit that the issuance of the temporary injunction in this case was within the jurisdiction of the Circuit Court of Mobile County, Alabama, and was within the sound discretion of the trial court who properly and lawfully exercised its sound discretion and enjoined trespassing by the Respondents in this case.

Since the order of the court denying the Motion to Dissolve and Dismiss the plaintiff's verified Bill of Complaint the defendants have continued to picket peacefully on the public sidewalks abutting on both sides of the subject property. The injunction in this case therefore in no way restricts the right of appellants to peacefully picket on the public sidewalks abutting on both sides of the sub-

ject property. For the reasons submitted we respectfully submit that certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief has been served upon the attorneys of record for appellants.

This 21st day of July 1969.

EDWIN J. CURRAN, JR.
Of Counsel for Appellee

NOV 29 1969

NO. 74

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLIFFORD TAGGART, ET AL., *Petitioners*,

v.

WEINACKER'S INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 74

CLIFFORD TAGGART ET AL., *Petitioners*,

v.

WEINACKER'S INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for a leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Petitioners has been obtained. Counsel for the Respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty affiliated labor organizations with a total membership of approximately thirteen million five hundred thousand.

The questions presented in the instant case are of great importance to the continued validity of the right to picket.

one of the handful of basic rights that employees have at their disposal during a labor dispute. Briefly stated, these questions are whether a State may utilize its trespass laws to prohibit peaceful picketing addressed to the public, which takes place on a thoroughfare open to the public but within the property of a privately-owned store (a single store shopping center (A 1-2)) without running afoul of the First and Fourteenth Amendments to the Constitution of the United States, the Supremacy Clause, or the pre-emption doctrine enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

A substantial portion of retail sales takes place at single and multi-store shopping centers which do not front on a publicly owned street and their percentage of the total market is on the increase. Thus, the decision of the court below, if sustained, could have a crippling effect on a number of the AFL-CIO's affiliates since it insulates a significant group of employers from effective peaceful picketing during a primary labor dispute involving them. For this reason the Federation requests this opportunity to present its views on the instant case to this Court.

Because of the range and complexity of the issues presented, the Petitioners have not concentrated on the relationship of this Court's decision in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968) to prior First Amendment decisions. It is the AFL-CIO's view that the case for reversal here is greatly strengthened by the fact that *Logan Valley* is part of the mainstream of First Amendment law, rather than an isolated decision which could be limited to its facts without causing significant side effects. The main burden of the Federation's brief *amicus* is therefore devoted to an exploration of the place of *Logan Valley* in the overall scheme of this Court's decisions.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioners.

Respectfully submitted,

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NO. 74

CLIFFORD TAGGART, ET AL., *Petitioners*,

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WEINACKER'S INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out at pp. 1-14 of the Petitioners' brief.

The interest of the AFL-CIO is set out at pp. iii-v of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

THE INSTANT DECISION OF THE SUPREME COURT OF ALABAMA IS INCOMPATIBLE WITH THIS

COURT'S DECISION IN AMALGAMATED FOOD EMPLOYEES V. LOGAN VALLEY PLAZA, 391 U.S. 308 (1968).

At the time *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) arose, Logan Valley was a newly developed shopping center (its perimeter spanned about 1.1 miles) situated near the City of Altoona, Pennsylvania, at the intersection of two heavily traveled public highways. While other occupants were expected, it was then occupied by Weis Markets, Inc (Weis) and Sears, Roebuck and Co. (Sears). Weis operated a supermarket engaged in selling food and sundry household articles and its property consisted of an enclosed modern market building with an open but covered porch running north and south along its front and a pick up zone directly along the porch for unloading purchased goods into customers' cars. Between the supermarket area and the highway berms were extensive parking lots to the east and south of Weis covering a distance from the highway entrances of 250 to 500 feet.

Weis opened for business, employing a wholly nonunion staff of employees and a week later, small groups of union members (averaging about 5-7 men and women) who were employed by nearby union markets and were not and had never been employees of Weis picketed the Weis store within the shopping center wearing placards reading "Weis Market is Non Union, these employees are not receiving union wages or other union benefits, Amalgamated Food Employees Union Local 590." They walked back and forth in front of the Weis supermarket, primarily at the pick up zone adjacent to the covered porch. The picketing did create sporadic and infrequent congestion but it was peaceful and unaccompanied by either oral threats or actual violence.

At the instance of Weis and Logan, an *ex parte* injunc-

tion was entered and continued after hearing, prohibiting all picketing within the shopping center, and in consequence limiting the picketing to the highway berms. The injunction was upheld by the Supreme Court of Pennsylvania on appeal. That Court reasoned that the picketing was a "trespass which very properly was restrained."

However, this Court reversed on the ground that the Pennsylvania decision was irreconcilable with the First Amendment. Mr. Justice Marshall wrote the opinion for the Court, Mr. Justice Douglas concurred in a brief separate opinion, Justices Black, Harlan, and White dissented; each writing a separate opinion.

The instant case arises in a strikingly similar context.

Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building in Mobile, Alabama. Weinacker's owns this building and the area (approximately one third of a mile in circumference (Pet. Br. App. B)) which surrounds it. Within this area sidewalks encircle the building, walkways lead to it, and a motor vehicle parking lot (between 115 and 385 feet deep, *ibid.*) for the use and convenience of the customers in parking their automobiles is located between the front of the building and the public property which adjoins the parking lot. The main entrance to the store building fronts to the south on the private sidewalk; the adjacent motor vehicle parking lot separates the store building and the private sidewalk from a public street called Government Street. The privately owned area which surrounds the store building is bounded on three sides by public sidewalks which are adjacent to public streets. (A 91-92, 1-2)

There has never been an evidentiary hearing in *Tanner*. Nevertheless, the following seems to be the essential story

of the picketing. The Union, Retail Clerks Local 458 of Mobile, was certified by the National Labor Relations Board as the exclusive bargaining agent of a unit of Weinacker's employees, after winning a Board conducted election (A27-65). Thereafter the Company committed a long list of flagrant violations of §§ 8(a)(1), (3) & (5) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 514, 29 U.S.C. 151 *et seq.* See *Weinacker Brothers, Inc.*, 153 NLRB 459 (1965), *enforced summarily*, No. 23,510, C.A. 5th Cir., 1966. And when bargaining failed to produce a contract, the Union struck on December 12, 1964 (A23). In support of the strike the Union picketed first on the public sidewalk and then on the walkway adjacent to the store (A91-92). From the Company's allegation it appears that there were two to three pickets. There is no dispute that the picketing was peaceful, and without any acts of actual violence or threats of violence (A91-92). However, Weinacker's contended that the picketing was obstructive and supported its position with six identically worded conclusory affidavits (A9-14). The Union denied this allegation (A87). As noted above, there was no evidentiary hearing but the Alabama courts found the picketing "had been carried on in such a manner as to obstruct [Weinacker's] customers" (A91-92). On January 22, 1965, the Circuit Court of Mobile, Alabama issued an ex parte injunction prohibiting "trespassing upon the property of . . . [Weinacker's] and . . . interfering with . . . [Weinacker's] property and right of ingress and egress to the . . . property and place of business" (A15-16). After a non-evidentiary hearing held on March 26, 1965 this injunction was continued in an opinion issued on April 1, 1969 (A90-95). On September 19, 1968, three years after the appeal was argued and submitted, the Supreme Court of Alabama affirmed the judgment of the Circuit Court (A96-121).

The foregoing makes it plain that the only factual distinction between *Logan Valley* and *Taggart* is that the shopping center here is smaller than Logan Valley Plaza and is occupied by a single large store rather than a number of stores. It is a segment of a business area equivalent to a single block in a downtown shopping area, surrounded by privately owned parking spaces, rather than an entire business complex offering a full range and variety of goods and services equivalent to those found in a traditional shopping district fronting on public streets. It is in a sense the ultimate example of the fragmentation of traditional downtown shopping areas brought about by the impact of the supermarket and the automobile. Thus the central question posed here is whether these factual distractions make a legal difference. The answer to this question turns on the nature and force of the principles upon which *Logan Valley* rests. We, therefore, turn to an analysis of the implications of that decision.

1. The Court's argument in *Logan Valley*, as we read it, proceeds through three stages. The first deals with and rejects the proposition that prior precedents culminating in *Teamsters* v. *Vogt*, 354 U.S. 284 (1957) which recognized a distinction between pure speech and picketing which involves both "speech and conduct, *i.e.* patrolling", support the conclusion that the "nonspeech aspects of peaceful picketing are so great as to render the provision of the First Amendment inapplicable to it altogether":

> "The majority of the cases from this Court relied on by respondents, in support of their contention that picketing can be subjected to a blanket prohibition in some instances by the States, involved picketing that was found either to have been directed at an illegal end, e.g., *Gibonev* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949), . . . or to have been directed to coercing a decision by an employer which, although in itself legal,

> could validly be required by the State to be left to the employer's free choice, e.g., *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722 (1942) (secondary boycott). . . . Those cases are not applicable here because they all turned on the purpose for which the picketing was carried on, not its location." (391 U.S. at 314)

In the second, Mr. Justice Marshall put to one side for the moment the question of whether thoroughfares in a shopping center should be equated with a municipally owned street in a business block to canvass the cases dealing with the First Amendment's protection of the distribution of views on the public streets. He concluded:

> "The essence of the opinions [in *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Hague* v. *CIO*, 307 U.S. 496 (1939); *Schneider* v. *State*, 308 U.S. 147 (1939); *Jamison* v. *Texas*, 318 U.S. 412 (1943)] is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.
>
> "The fact that *Lovell*, *Schneider*, and *Jamison* were concerned with handbilling rather than picketing is immaterial so far as the question is solely one of right of access for the purpose of expression of views. Handbilling, like picketing, involves conduct rather than speech, namely, the physical presence of the person distributing leaflets on municipal property. If title to municipal property is, standing alone, an insufficient basis for prohibiting all entry onto such property for the purpose of distributing printed matter, it is likewise an insufficient basis for prohibiting all entry for the purpose of carrying an informational placard. While the patrolling involved in picketing may in some cases constitute an interference with the use of public property greater than that produced by handbilling, it is clear that in other cases the converse may be true." (391 U.S. at 315-316)

This portion of the Court's opinion then goes on to explore the nature and rationale for permissible state regulation of the "public forum", see, H. Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Supreme Court Review 1. The State may regulate "the exercise of First Amendment rights . . . on property open to the public generally . . . so as to prevent interference with the use to which the property is ordinarily put by the State . . . *Cox* v. *Louisiana*, 379 U.S. 559 (1964)" or to insure that "such exercise will [not] unduly interfere with the normal use of public property by other members of the public with an equal right of access to it . . . *Cox* v. *New Hampshire*, 312 U.S. 569 (1941)." (391 U.S. at 320-321) But:

> ". . . the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct. Here it is perfectly clear that a prohibition against trespass on the mall operates to bar all speech within the shopping center to which respondents object. Yet this Court stated many years ago, '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' *Schneider* v. *State*, 308 U.S. 147, 163 (1939)." (391 U.S. at 323-324)

Having reaffirmed these propositions, Mr. Justice Marshall turned to the question of whether they were applicable to conduct occurring on a thoroughfare in a privately owned shopping center:

> "This Court held, in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held.
>
> . . . . .
>
> "The shopping center here is clearly the functional equivalent to the business district of Chickasaw in-

> volved in Marsh. . . . Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town."
>
> . . . . .
>
> "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is all that is at issue." (391 U.S. at 317, 318, 324)

Mr. Justice Douglas's opinion follows the majority opinion quite closely. Its main feature is the specificity with which it deals with the permissible scope of state regulation of intermixed speech and conduct:

> "Picketing is free speech *plus*, the *plus* being physical matters. Hence, the latter aspects of picketing may be regulated. . . . The courts of Pennsylvania are surely capable of fostering a decree that will insure noninterference with customers and employees while enabling the union members to assemble sufficiently close to Weis' market to make effective exercise of the First Amendment rights." (391 U.S. at 326)

2. Each of the elements of *Logan Valley's rationale* is soundly based on the core values embodied in The First Amendment.

First, the animating principle at work in *Logan Valley* is

that stated by Mr. Justice Roberts in *Hague v. CIO*, 307 U.S. 496, 515 (1939).

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

The underpinning for this principle in practical terms, is that communication on the streets in a business area is proper "precisely because the primary activity for which [they are designed] is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin v. Port of New York Authority*, 392 F.2d 83 (C.A. 2nd Cir. 1968) *certiorari denied* 393 U.S. 940 (1968).

As Professor Kalven has noted (1965 Supreme Court Review *supra*, at 12-13) this view of the matter has an "aura of a large democratic principle. When the citizen goes to the street [to communicate] he is exercising a universal right of a freeman; a kind of First-Amendment easement. [The streets are thus] a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom." This principle is basic to First Amendment law because the "liberty of circulating is as essential to . . . freedom [of speech] as liberty of publishing, indeed, without the circulation the publication would be of little value. *Ex Parte Jackson*, 96 U.S. 727, 733." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Allowing the States to close the streets at their discretion to the circulation of free speech would effectively curtail to a substantial degree the uninhibited, robust and wide-open debate to which the First Amendment com-

mits us. *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). It would inhibit the right of expression of those whose means are too limited to utilize methods of communication other than the handbill and the picket sign. It would, therefore, damage the entire society by limiting the opportunities of both the potential publishers and their auditors. And as this Court recognized in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) meaningful access to the relevant audience is of the essence under the First Amendment:

> "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (395 U.S. at 390)

By the same token, "the rights of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" require a rule which does not allow the "owner" of a thoroughfare to shut off communication whose message is abhorrent to him, *cf.*, *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965). Thus where First Amendment rights are at stake common law property concepts, which would afford the State complete and absolute dominion over the streets, have no legitimate role to play. In this context, as in maritime law, these concepts, whose roots may be traced "to a heritage of feudalism" are not applicable "in an industrialized urban society."

Kovacs v. Compagnie Generale Transatlantique, 358 U.S. 625, 631-632 (1958). Like the common law of libel, property concepts must, in appropriate instances, give way to our devotion to the facilitation of free speech, *cf. New York Times v. Sullivan, supra.*

Moreover as the Court explicitly recognized in *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939)) and *Logan Valley*, 391 U.S. at 323; *compare Wolin v. Port of New York Authority, supra*, 392 F.2d at 89-91, the evil which would result from allowing the states to close the streets to the circulation of information is not abated by the fact that they might choose to close only some streets to that activity. The reasons are obvious from the facts of the instant case. Here, the Union was interested in reaching those who intended to trade with Weinacker's. The natural and effective place to do so was on the thoroughfare in front of Weinacker's store. The attempt to communicate with the limited class which the Union wished to reach could be frustrated by a variety of factors if that location was declared off limits. It could be frustrated by the fact that those interested in trading with Weinackers could only be identified as they approached the shopping center, and if they came by automobile, as is likely, their mode of conveyance would insulate them from the Union's message if that message was delivered at the outskirts of the center. It could be frustrated by the fact that the Union's limited manpower and resources would be dissipated if it attempted to reach the entire community in order to make sure that it reached the limited class to whom its message was relevant. It could be frustrated by the fact that a message remote in time and place tends to be drowned in the torrent of information the public receives every day. Indeed, the argument that the opening of other areas to free speech should be taken into account as a justification for restrict-

ing speech elsewhere quickly reduces to an absurdity which justifies every abridgement. For every state and subdivision has power over only a limited geographic area, and unless all act in concert there is always an area, somewhere, open for the circulation of ideas.

Second, *Logan Valley* fuses the teachings of *Hague* v. *CIO* and *Marsh* v. *Alabama*, 326 U.S. 501 (1946). Shopping center thoroughfares have a role to play as public forums because the center "serves as the community business block 'and is freely accessible and open to the people in the area and those passing through.' " 391 U.S. at 318. Mr. Justice Roberts's opinion in *Hague* v. *CIO* recognizes that the vitality of urban life is increased if the hubs of population concentration are utilized to facilitate the traffic in ideas as well as the traffic in goods. It is hospitable to the concept that the pleasure and excitement of civilized city life is enhanced by fostering "the disharmony of controversy" engendered by free speech "because . . . in that unrest [lies] the best prospect of an ordered society." *Wolin* v. *Port of New York Authority*, 392 F.2d at 91.

Marsh is sensitive to this need; it's key insight responds to it: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506. For unless *Marsh* had been viewed as the natural development of, and safeguard for, the principles of *Hague* v. *CIO*, the historical right to use the streets for the dissemination of views would have been at the mercy of changes in patterns of land development which leave title to street frontage in the abutting property owner. And today we are witnessing just such changes. The sprawling urban areas our motorized society encourages frequently have no traditional municipally-

owned town center. The commercial life of these areas is centered on a series of privately owned shopping areas, see R. Myers, Suburban Shopping Centers (Small Business Bulletin No. 27, U.S. Small Business Administration, 1963). Thus *Logan Valley*, strikes the balance between access to this natural public forum and "a property right worn thin by the public usage," *Schwatz-Torrence Investment Corp.* v. *Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P.2d 921, *certiorari denied* 380 U.S. 906 in favor of free speech. This balance is plainly in accord with the dominant trend of First Amendment law. "The First Amendment would, . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1967). For this reason the leading opinion in *Schneider* v. *State* sets the balance in favor of a broad freedom to circulate views which can only be overcome by a compelling state interest:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties. . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State*, 308 U.S. at 161.

Naturally there are counters on the other side. They were of little weight in *Logan Valley* and are of equally little

weight here. But that does not mean that there is an inevitable progression from *Logan Valley* to the protection of picketing or pamphleteering inside a store, compare 391 U.S. at 339-340. The historical right at issue here is access to public thoroughfares. Of course, as the opinion in *Wolin v. Port of New York Authority*, which upheld access to a bus terminal, emphasizes, the fact that the thoroughfare in question has, or does not have, a roof over it does not provide a key to the problem but a calculus of interests, based upon a determination of when "the abrasion caused by any protected speech would too greatly interfere with other interests" does. And that calculus of interests does not entail a mindless extension of access for pickets from a multipurpose area such as a street to an area devoted to selling, or to one in which there is a true interest in privacy, see 392 F.2d at 90.

Third, all of the common methods of circulating views to the general public, the distribution of a pamphlet or a newspaper, the use of sound trucks or amplified soap box oratory, the act of addressing a meeting, the use of airwaves to broadcast a radio or television message, the carrying of a placard, have collateral effects qualitatively different from those entailed by a quiet conversation in one's home. Depending on considerations of time, place, manner and circumstances, they may interfere with the interest in unobstructed movement, the desire for uninterrupted quiet, or the right to use a scarce facility to air opposing views. Thus it does no disservice to the cause of free speech to recognize that the right to transmit a message to the public at large is not beyond regulation. It must be subject to rules, such as Robert's Rules of Order, which set reasonable guidelines designed to maximize orderly communication.

Logan Valley articulates the limits that the First Amend-

ment places on such regulation: "the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct," 391 U.S. at 323. Or, as Mr. Justice Douglas noted (391 U.S. at 326), "Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters. Hence, the latter aspects of picketing may be regulated." (emphasis in original). The permissible range of regulation does not include the power to create a "sanctuary from which some members of the public may be excluded merely because of the ideas they espouse." Thus the state's freedom to regulate "speech plus," which takes place at an appropriate locus, does not include the right to ban it outright; instead, only regulations designed to accommodate that activity with the interest of all citizens to move freely is permissible.

As *Logan Valley* itself demonstrates, the major practical difficulty of the dichotomy between "pure speech" and "speech plus" is that a number of state courts concluded that "speech plus" was subject to unlimited regulation. This, of course, is inconsistent with this Court's holdings. As a means of communication, picketing is free speech and is entitled to every constitutional protection afforded other forms of circulating views, such as handbilling.

The test in *Thornhill* v. *Alabama*, 310 U.S. 88, 104-105 (1939), that an abridgement of the right to publicize through peaceful picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion," precisely parallels the general rule governing all forms of expression, laid down by

Justice Holmes on behalf of this Court in *Schenck* v. *United States*, 249 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," *Cf. Dennis* v. *United States*, 341 U.S. 494, 510 (1951). And as the Court observed in *Logan Valley*, 391 U.S. at 313-315, 320-321, not a single holding of this Court regarding the status of picketing in a case subsequent to *Thornhill* departs from the test enunciated in that decision.[1] Thus this aspect of the Courts reasoning, as well as those previously reviewed, pp. 8-14 *supra* demonstrates the continuity of the doctrine embodied in the opinion.

3. The essence of *Logan Valley* is that the First Amendment protects the right of "workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise and minority groups seeking nondiscriminatory hiring policies" to bring their message to their natural audience, the store's customers, at the locus that audience is most likely to be found, the pedestrian thoroughfare at the store's entrance, through peaceful nonobstructive picketing or handbilling. And that businesses should not be allowed to "immunize themselves . . . by creating a *cordon sanitaire* of parking lots around their stores," 391 U.S. at 325. As we have shown, that conclusion is solidly based in reason, in considerations

[1] We naturally do not concede that every picketing case cited in *Logan Valley* was rightly decided. In several instances the Court viewed the factual situation differently from the way we would have viewed it. But this does not affect our submission that, assuming *arguendo* the correctness of the Court's interpretation of the facts and of its evaluation of the object of the picketing, there has been undeviating decisional consistency on the status of picketing as such.

of policy and in this Court's First Amendment decisions prior to *Logan Valley*. Thus there is no legitimate basis for truncating *Logan Valley* as the Alabama courts have attempted to do.

Certainly their invitation to measure constitutional rights by the metes and bounds of the site must be rejected. For it is an open invitation to unprincipled adjudications. And as this Court has recently acknowledged, in labor relations, this invitation has been accepted far too often, *cf. Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, (1969). The strength of this Court's decisions, from *Schneider* v. *State* through *Logan Valley* inheres in the refusal to allow the states to limit the places at which handbilling or picketing may take place on the ground that other places remain open. Since the thrust of the First Amendment is to maximize communication, the law has simply distinguished between appropriate and inappropriate locations for public speech; it has not sought to restrict publishers to a single site that the courts or the states believe to be ideal, necessary or most appropriate. Within these wide limits it is for the individuals involved to determine how best to propagate their message:

> "As we have said the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. at 163.

It is equally plain that the distinction between a single store shopping center and a multi-store center is unsound. No store, no matter how small, fronting on a publicly owned street can constitutionally be immunized from picketing or handbilling directed toward its policies.

There is no reason to free a substantial business such as Weinacker's, from the impact of such activity because of the happenstance that it holds title to the thoroughfare open to the public in front of its store.

As the Supreme Court of California stated in another very similar case, *In re Lane*, 72 LRRM 2286, 2287-2290 (August 20, 1969):

> "In the case at hand we have the identical situation the court warned against [in Logan Valley]. If we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights in effect we would be saying that by erecting a 'cordon sanitaire' around its store, Calico has succeeded in immunizing itself from on-the-spot public criticism.
>
> * * * *
>
> "Here, the public sidewalk which Calico suggests is available for First Amendment purposes is located some 150-280 feet from the store. The posted speed limit is 40 miles per hour on Monument Boulevard which adjoins that public sidewalk. The customary manner by which customers reach the market is by automobile and use of the parking lot. Thus, the difficulties and hazards to those attempting to exercise First Amendment privileges are as present here as they were in Logan Valley.
>
> "The only significant distinction between [*Logan Valley; Schwartz-Torrance Inv. Corp.* v. *Bakery & Confectionery Workers' Union* (1964) 61 Cal., 2d 766; *In Re Hoffman* (1967) 67 Cal. 2d 845] and the instant case is the more limited purposes for which the particular sidewalk is designed to serve; here, the customers of one store, and in the other cases customers of two or more stores, or as a route of access to other places or purposes. Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exer-

> cise First Amendment rights. . . . Certainly the paramount and preferred place given to the First Amendment freedom of speech right in our democratic system . . . should be accorded precedence over the mere 'naked title' . . . of market owner Stewart's interest in the premises.

* * *

It is the Supreme Court of California and not the Supeme Court of Alabama, which has captured the principled basis of *Logan Valley*. It's decision and not that of the court below points the way to the proper disposition of the instant case.

CONCLUSION

For the above-stated reasons, as well as those set out by the Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

J. Albert Woll,
General Counsel, AFL-CIO

Robert C. Mayer

Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

November 1969

NOV 28 1969
JOHN F. DAVIS, CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, *ET AL.*,
Petitioners,

v.

WEINACKER'S, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

Petition for Certiorari Filed March 28, 1969
Certiorari Granted October 13, 1969

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, *ET AL.*,

Petitioners,

v.

WEINACKER'S, INC.,

Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

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A TRANSCRIPT OF THE RECORD AND PROCEEDINGS OF A CERTAIN CAUSE HERETOFORE PENDING IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA IN EQUITY

At a Regular Session of the Circuit Court of Mobile County, Alabama at which the Officers authorized by law to hold or serve such Court were serving, the following proceedings were had in the cause styled:

WEINACKER'S INC., A Corporation,
Complainant

vs.

Case Number
63,733-McC

CLIFFORD TAGGART, RILEY HOBBS, JAMES STUCKEY, Individually & d/b/a President of Retail Clerks' Union Local 458 of Mobile and RETAIL CLERKS' UNION LOCAL 458 OF MOBILE
Respondents

ORIGINAL BILL AND FIAT

PETITION FOR TEMPORARY AND PERMANENT RESTRAINING ORDER

ONE

Comes your Complainant, Weinacker's, Inc., a corporation, incorporated under the laws of the State of Alabama and having its main office in the City of Mobile, State of Alabama.

TWO

The corporation is in possession and operation of a shopping center on the North side of Government Street between Catherine Street and Macey Street in the City of Mobile, State of Alabama, wherein groceries, drugs and other goods are sold to the general public.

THREE

Weinacker's, Inc., owns the said shopping center and the said shopping center and its parking area and walkways ad-

jacent to the shopping center are the properties of the corporation and are used by the customers of the shopping center.

FOUR

The three individually named Respondents are members of the [2] Respondent Retail Clerk's Union Local 458 of Mobile and are engaged in picketing the shopping center at the above described location in Mobile County, Alabama. The Respondents jointly and separately and as members of the named Union have trespassed on the property of the Complainant and continue to do so after warning and after arrest.

FIVE

The continuous trespassing by the named Respondents has deprived the Complainant of the peaceful possession and enjoyment of its property and premises and the trespassing has interferred with the Complainant's right of peaceful possession of its property and has interferred with the Complainant in the conducting of its business in the operation of the above described shopping center, and the Complainant has been damaged in that he has lost the peaceful use of his property and the right of operating his business without the interference from any unlawful trespass upon its premises.

SIX

The Respondents have walked back and forth in front of the door or doors to the shopping center on the area owned and occupied by the Complainant and in the possession of the Complainant in the operation of its shopping center.

SEVEN

The Respondents are causing irreparable injury to the Complainant by reason of the continuous trespass and interference with the Complainant in and about the Complainant's business and unless the Respondents are enjoined from

trespassing on the private property of the corporation as prayed for herein, the Complainant will be irreparably injured and damaged and it will be a continuous invasion of the property and the property rights of the Complainant by the Respondents and the Complainant does not have an adequate remedy at law to enjoin the continuous trespass by the Respondents upon the Complainant's property and the interference with the Complainant's business and property rights.

WHEREFORE, The Complainant prays that process be issued and that the Complainant be given immediate injunctive relief by posting a bond with good and sufficient sureties as prescribed by this Honorable Court and that the Respondents be enjoined as prayed for herein.

PRAYER FOR RELIEF

WHEREFORE, your Complainant prays that this Honorable Court forthwith issue a temporary writ to enjoin the Respondents directly [3] and indirectly from entering upon property of the Complainant and that they be enjoined from any act on the property of the Complainant which would be a trespass upon the Complainant's property and grant unto your Complainant all other fit and proper relief that it may be entitled to and the Complainant prays to do equity and abide by the rules of this Honorable Court. Court.

/s/ M. A. Marsal
Attorney for the Complainant

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now G. HORACE WEAVER, the undersigned and being by me first duly sworn doth depose and say that he is Assistant Superintendent of Weinacker's, Inc., and is personally acquainted with the facts alleged herein and the facts therein are true and correct.

/s/ G. Horace Weaver

Subscribed and Sworn to before me this 20th day of January, 1965.

/s/ Sandra Dowling
Notary Public, Mobile County, Alabama

Respondent Clifford Taggart's address is 1 South Lawrence Street, Mobile;

Respondent Riley Hobbs' address is 57 North Julia Street, Mobile;

Respondent James Stuckey's address is 1 South Lawrence Street, Mobile;

Respondent Retail Clerks' Union Local 458 of Mobile is located at 1 South Lawrence Street, Mobile.

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now the undersigned and being by me first duly sworn doth depose and say that he is personally acquainted with the fact that the Respondents have trespassed upon the property of the Complainant and that the Complainant, Weinacker's, Inc., is a corporation incorporated under the laws of the State of Alabama and is engaged in the operation of a shopping center on Government Street in the City of Mobile and that the Respondents named in the complaint to which this affidavit is attached have trespassed after warning on the property of Weinacker's, Inc., an Alabama corporation.

/s/ G. Horace Weaver

[4] Subscribed and Sworn to before me this 20th day of January, 1965.

/s/ Sandra Dowling
Notary Public, Mobile County, Alabama

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now the undersigned and being by me first duly sworn doth depose and say that he is personally acquainted with the fact that the Respondents have trespassed upon

the property of the Complainant and that the Complainant, Weinacker's, Inc., is a corporation incorporated under the laws of the State of Alabama and is engaged in the operation of a shopping center on Government Street in the City of Mobile and that the Respondents named in the complaint to which this affidavit is attached have trespassed after warning on the property of Weinacker's, Inc., an Alabama corporation.

/s/ Dewey West

[NOTARIAL SEAL]

Subscribed and Sworn to before me this 21st day of January, 1965.

/s/ Wilhelmina L. Lee
Notary Public, Mobile County, Alabama * * *

FIAT

The foregoing petition for a temporary injunction, pending final hearing of this cause, having been presented to me for fiat and the Court being of the opinion that no substantial injury is likely to result to complainant from delay, it is ordered, adjudged and decreed by the Court that the application for a temporary injunction be and the same is hereby set down for hearing on the 25th day of January 1965, at 9:30 A.M., before me or some other Judge of the Circuit Court of Mobile County, Alabama.

It is further ordered, adjudged and decreed by the Court that notice of the time and place appointed for the hearing of the application be given the respondent(s) named therein, such notice to be given them at least three days prior to the hearing of the application and that they be served with a copy of the bill of complaint.

ORDERED, ADJUDGED AND DECREED by the Court this 21st day of [5] January, 1965.

/s/ Dan T. McCall, Jr.
Circuit Judge

Filed January 21, 1965
/s/ W. Elsworth Haughton, Register

SUBPOENA

CIRCUIT COURT OF MOBILE COUNTY,
AT MOBILE, ALABAMA, (In Equity)

THE STATE OF ALABAMA)
MOBILE COUNTY)

To Any Sheriff of the State—Greetings:

You are hereby commanded to summon CLIFFORD TAGGART; RILEY HOBBS, JAMES STUCKEY, Individually and as PRESIDENT OF RETAIL CLERKS' UNION LOCAL 458 OF MOBILE; & RETAIL CLERKS' UNION LOCAL 458 OF MOBILE to appear and plead, answer or demur, within thirty days from the service hereof, to a Bill of Complaint/& FIAT filed in the Circuit Court of Mo- [illegible] which is hereto attached), against YOU AND EACH OF YOU Defendant, by WEINACKER'S INC., ETC., Complainant.

Witness my hand, this 21st day of January 1965.

/s/ W. Elsworth Haughton
Register

Received on the 21st day of January, 1965 and on the 21st day of January, 1965 I served copies of the within subpoena and copies of the Bill of Complaint on Riley Hobbs and James Stuckey, individually and as President of Retail Clerks' Union Local 458 of Mobile and on the 22nd day of January, 1965 by service on Clifford Taggart and Retail Clerks' Union Local 458 of Mobile by service on Clifford Taggart, Sec.-Treas.

Ray D. Bridges, Sheriff
By s/ H. Davis
s/ J.W. Lloyd D.S.
s/ M. Books

NOTICE OF HEARING APPLICATION

The State of Alabama) Circuit Court of Mobile County
Mobile County) In Equity

To CLIFFORD TAGGART, RILEY HOBBS, JAMES STUCKEY, INDIVIDUALLY AND AS PRESIDENT OF RETAIL CLERKS' UNION LOCAL 458 OF MOBILE; AND RETAIL CLERKS' UNION LOCAL 458 OF MOBILE,

Greetings:

[6] You will please take notice, that in a certain cause pending in the Circuit Court of Mobile County at Mobile, Alabama, Equity Side, wherein WEINACKER'S INC., ETC., Complainant, CLIFFORD TAGGART, ET AL., Defendant, AN APPLICATION FOR A TEMPORARY INJUNCTION has been filed by WEINACKER'S INC., ETC. and that said APPLICATION will be heard by the Hon. Dan T. McCall, Jr., a Judge of said Court, on the 25th day of January A.D., 1965 at 9:30 o'clock A.M.

Witness, W. Elsworth Haughton, Register of said Circuit Court, at office this 21st day of January A.D. 1965.

s/ W. Elsworth Haughton
Register

Received on the 21st day of January, 1965 and on the 21st day of January, 1965 I served copies of the within notice of hearing application and also copies of the Bill of Complaint on Riley Hobbs and James Stuckey, individually and as President of Retail Clerks' Union Local 458 of Mobile and on the 22nd day of January, 1965 by service on Clifford Taggart and Retail Clerks' Union Local 458 of Mobile by service on Clifford Taggart, Sec.-Treas.

Ray D. Bridges, Sheriff
By: s/ H. Davis
s/ J. W. Lloyd D.S.
s/ M. Books

[REVERSE SIDE:]

Received January 21, 1965, Sheriff's Office

MOTION TO QUASH

Come now the Respondents in the above styled cause, by and through one of their Solicitors, appearing specially for the sole purpose of filing this Motion to Quash the entire bill and each and every aspect thereof, and for no other purpose whatsoever on the grounds that:

1. This Honorable Court has no jurisdiction over a lawful strike and the peaceful picketing activities connected therewith.

[7] 2. The National Labor Relations Board, federal statutes and procedures have preempted this field and therefore this court has no jurisdiction.

3. State courts lack jurisdiction to regulate union conduct that is potentially subject to exclusive regulation under the Labor Management Relations Act.

4. Peaceful conduct that is arguably protected or prohibited by the Federal Labor Management Relations Act is not subject to state regulation.

Simon and Wood
Solicitors for Respondent
By: s/ Otto E. Simon

Certificate of Service

I do certify that I have on this 22nd day of January, 1965, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed and first class postage prepaid.

Simon and Wood
By: s/ Otto E. Simon

Filed January 22, 1965
s/ W. Elsworth Haughton, Register

ORDER OF CONSOLIDATION

It appearing to the Court that in the above styled cause and cause No. 63,733-McC on the docket of this Court the parties to the suit and the subject matter is one and the same and that it would be to the best interests that this cause be consolidated, it is ORDERED, and DECREED by the Court that the above styled cause be and the same hereby is consolidated into Cause No. 63,733-McC and the original bill in this cause be treated as a amendment to the bill of complaint in cause No. 63,733-McC and that all future litigation in regard to same shall be filed in cause No. 63,733-McC.

Dated, January 25, 1965.

/s/ Dan T. McCall, Jr.
Judge

PETITION FOR IMMEDIATE INJUNCTIVE RELIEF

Comes now your Petitioner and shows unto the Court as follows:

ONE

On January 21, 1965 this Honorable Court issued a fiat to the named Respondents ordering the request for an injunction to be set for a hearing at 9:30 Monday, January 25, 1965.

TWO

After receiving this notice actual or constructive, the Respondents [Clifford Taggart & Riley Hobbs (in ink)] have proceeded to constantly trespass upon the Complainant's property by marching or parading back and forth to the immediate doorway of the Complainant's place of business. Your Petitioner alleges that this conduct has been more intensive since the Court entertained the Complainant's petition and set the cause for hearing as described above and that such action on the part of the Respondents are at this time causing an irreparable injury to the Complainant

in that the actions of the Respondents constitute obstructing customers from entering and leaving the Complainant's place of business and the Complainant alleges that the acts are outside the realms of peaceful picketing and constitute an immediate invasion of his property and his property rights contrary to the laws of the State of Alabama and the Constitution of the United States of America.

THREE

Your Complainant alleges that it is necessary to receive immediate injunctive relief to enjoin the continuous obstructing of the doorway to the Complainant's shopping center and that the Petitioner has no adequate remedy at law other than the facilities of this Honorable Court by enjoining the Respondents from such acts.

FOUR

Your Complainant respectfully prays that this Honorable Court issue a temporary writ of injunction after requiring the Complainant to enter into a bond with good and sufficient sureties as required by this Honorable Court.

WHEREFORE, your Petitioner respectfully prays that the allegations of the Petition filed in this Court in this original cause as of January 21, 1965 be adopted and made a part hereof and that this Honorable Court forthwith order the Respondents and agents, servants or employees [and any and all persons acting in concert with (in ink)] from trespassing upon the property of the Complainant and from further interfering with the Complainant's property and right [9] of ingress and egress to the Complainant's property and place of business and grant unto the Complainant all other fit and proper relief that the Complainant might be entitled to and shows unto the Court that an irreparable injury will result unless this Honorable Court grant the relief as so prayed.

/s/ M. A. Marsal
Attorney for Complainant

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now Dewey West, the undersigned, and being by me first duly sworn doth depose and say that he is personally acquainted with the facts alleged herein and the facts therein are true and correct.

/s/ Dewey West

Subscribed and sworn to before me on this 22nd day of January, 1965

/s/ Gloria Lane
Notary Public, Mobile County, Ala.
State of Alabama At Large * * *

(NOTARIAL SEAL)

MOBILE, ALABAMA, JANUARY 22nd, 1965.

To the Register of the Circuit Court of Mobile County, Alabama:

Let temporary writ issue as prayed for in the complaint and upon complainant entering into bond in the sum of TWO THOUSAND & no/100 $2,000.00 – conditioned as provided by law. Bond to be approved by you.

/s/ Dan T. McCall, Jr.
Circuit Judge

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now the undersigned and after being duly sworn doth depose and say that he/~~she~~ has direct knowledge of the fact that on January 22, 1965 the Respondents have trespassed upon the Complainant's property to the extent of obstructing the customers in entering and leaving the door of Weinacker's, Inc. on Government Street in the City of Mobile and that the Respondents in carrying signs are acting in such a way as to interfere with the Complainant's business and such action is on the private property of the Complainant's corporation.

[10] /s/ G. Horace Weaver

Subscribed and sworn to before me on this 22nd day of January, 1965.

/s/ Gloria Lane
Notary Public, Mobile County,
Alabama * * *

(NOTARIAL SEAL)

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now the undersigned and after being duly sworn doth depose and say that he/she has direct knowledge of the fact that on January 22, 1965 the Respondents have trespassed upon the Complainant's property to the extent of obstructing the customers in entering and leaving the door of Weinacker's, Inc. on Government Street in the City of Mobile and that the Respondents in carrying signs are acting in such a way as to interfere with the Complainant's business and such action is on the private property of the Complainant's corporation.

/s/ Thelma Burroughs

Subscribed and sworn to before me on this 22nd day of January, 1965.

/s/ Gloria Lane
Notary Public, Mobile County,
Alabama * * *

(NOTARIAL SEAL)

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now the undersigned and after being duly sworn doth depose and say that he/she has direct knowledge of the fact that on January 22, 1965 the Respondents have trespassed upon the Complainant's property to the extent of obstructing the customers in entering and leaving the door of Weinacker's, Inc. on Government Street in the City of Mobile and that the Respondents in carrying signs are acting in such a way as to interfere with the Complainant's business and such action is on the private property of the Complainant's corporation.

/s/ Mary Richardson

Subscribed and sworn to before me on this 22nd day of January, 1965.

/s/ Gloria Lane
Notary Public, Mobile County,
(NOTARIAL SEAL) Alabama * * *

STATE OF ALABAMA
COUNTY OF MOBILE

[10A] Comes now the undersigned and after being duly sworn doth depose and say that she has direct knowledge of the fact that on January 22, 1965 the Respondents have trespassed upon the Complainant's property to the extent of obstructing the customers in entering and leaving the door of Weinacker's, Inc. on Government Street in the City of Mobile and that the Respondents in carrying signs are acting in such a way as to interfere with the Complainant's business and such action is on the private property of the Complainant's corporation.

/s/ Myrtis Chaillot

Subscribed and sworn to before me on this 22nd day of January, 1965.

/s/ Gloria Lane
Notary Public, Mobile County,
(SEAL) Alabama * * *

STATE OF ALABAMA
COUNTY OF MOBILE

Comes now the undersigned and after being duly sworn doth depose and say that he has direct knowledge of the fact that on January 22, 1965 the Respondents have trespassed upon the Complainant's property to the extent of obstructing the customers in entering and leaving the door of Weinacker's, Inc. on Government Street in the City of Mobile and that the Respondents in carrying signs are acting in such a way as to interfere with the Complainant's business and such action is on the private property of the Complainant's corporation.

/s/ Eddie B. Turner

Subscribed and sworn to before me on this 22nd day of January, 1965.

/s/ Gloria Lane
Notary Public, Mobile County,
Alabama * * *

(SEAL)

STATE OF ALABAMA
COUNTY OF MOBILE

[11] Comes now the undersigned and after being duly sworn doth depose and say that he/she has direct knowledge of the fact that on January 22, 1965, the Respondents have trespassed upon the Complainant's property to the extent of obstructing the customers in entering and leaving the door of Weinacker's, Inc. on Government Street in the City of Mobile and that the Respondents in carrying signs are acting in such a way as to interfere with the Complainant's business and such action is on the private property of the Complainant's corporation.

/s/ Mildred Weninegar

Subscribed and sworn to before me on this 22nd day of January, 1965.

/s/ Gloria Lane
Notary Public, Mobile County,
Alabama * * *

(NOTARIAL SEAL)

Filed January 22, 1965
/s/ W. Elsworth Haughton, Register.

Writ of Injunction

CIRCUIT COURT OF MOBILE COUNTY
IN EQUITY

THE STATE OF ALABAMA }
MOBILE COUNTY }

To Any Sheriff of the State of Alabama-Greeting:

WE COMMAND YOU, That, without delay, you execute this writ, and due return thereof how you have executed the same make to us.

To CLIFFORD TAGGART, RILEY HOBBS, JAMES STUCKEY, INDIVIDUALLY & AS PRESIDENT OF RETAIL CLERKS' UNION, LOCAL 458 OF MOBILE: RETAIL CLERKS' UNION LOCAL 458 OF MOBILE.

WHEREAS WEINACKER'S INC., ETC. has this day filed ITS ORIGINAL Bill of Complaint in said Court against CLIFFORD TAGGART, RILEY HOBBS, JAMES STUCKEY, INDIVIDUALLY & AS PRESIDENT OF RETAIL CLERKS' UNION, LOCAL 458 OF MOBILE: RETAIL CLERKS' UNION LOCAL 458 OF MOBILE praying, among other things, that THE ABOVE RESPONDENTS AND AGENTS, SERVANTS OR EMPLOYEES AND ANY AND ALL PERSONS ACTING IN CONCERT WITH BE RESTRAINED AND ENJOINED FROM TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS.

AND WHEREAS, on said Bill being exhibited to the Hon. DAN T. MCCALL, JR. a Judge of the Circuit Court of Mobile County, Alabama, on the 22nd day of January A.D., 1965, he did order that upon Complainants entering into Bond with sureties in the sum of TWO THOUSAND & no/100 ($2,000.00)—Dollars, payable to and approved by the Register of this Court, and conditioned according to law, a Writ of Injunction issue out of said Court according to

the prayer of said Bill: And Whereas, bond has been given and approved as required by said order.

These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from—TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS, until the further orders of this Court. And this you will in no wise omit under penalty, &c.

WITNESS, W. ELSWORTH HAUGHTON, Register of the Circuit Court of Mobile County, Alabama, Equity Side, this 22nd day of January A.D. 1965.

/s/ W. ELSWORTH HAUGHTON
Register of the Circuit Court of Mobile County, Alabama

[Executions Omitted]

---

[15] **AMENDED BILL AND FIAT**

Pursuant to an order of Court dated January 25, 1965, the Petition for Immediate Injunctive Relief and Fiat, originally filed January 22, 1965 and set out on Page 8 of this transcript, is now "treated as an amendment" to the original bill set out on Page 1 of this transcript and therefore is not recopied at this point.

PLEA TO THE JURISDICTION

Come now the Respondents in the above styled cause by and through their Solicitor, appearing specially for the sole purpose of filing this plea to the jurisdiction and for no other purpose and without waiving any other defenses which they may have in law or in equity, respectfully show the court the following facts:

ONE

The Respondent, Retail Clerks Union, Local 458 of Mobile, is an unincorporated voluntary association of individuals and is a labor organization within the meaning of the National Labor Relations Act, [16] as amended (29) U.S.C. Paragraph 151, et seq.),

TWO

The individual respondents, Clifford Taggart, Riley Hobbs, and James Stuckey, individually and as President of Retail Clerks Union, Local 458 of Mobile, Alabama, are members of such organization.

THREE

The Complainant, Weinacker's, Inc., a corporation, is an employer within the meaning of the National Labor Relations Act, as amended.

FOUR

The Respondent Union has as its members and represents in matters of collective bargaining with their employers in Mobile, Alabama, area, persons who are retail

clerks who work in shopping centers and grocery stores in selling to the general public. It has collective bargaining agreements in effect with numerous other retail stores in Mobile, Alabama, and in the surrounding area covering wages, hours and conditions of employment of the clerks employed by these retail outlets. The members of such organization have worked long and diligently for many years to establish high working standards and beneficial wage levels.

FIVE

Respondents, Retail Clerks Local 438 of Mobile, Alabama, AFL-CIO, "hereinafter referred to as the Union", began an organizational campaign in Complainant's Mobile, Alabama, operations in the latter part of August or September, 1963. On December 19, 1963, the Union filed a petition with the National Labor Relations Board seeking certification of certain employees at Complainant's Mobile, Alabama, operations. (See *Exhibit No. 1*, which is attached hereto and made a part hereof.)

SIX

On January 20, 1964, a representation hearing was conducted by the National Labor Relations Board.

SEVEN

On February 13, 1964, Charles M. Paschal, Jr., Acting Regional Director for the Fifteenth Region, National Labor Relations Board, acting upon the entire record, issued a decision and direction of election. His findings were as follows:

> 1. The employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert [17] jurisdiction herein.
>
> (The Board found that in the twelve months prior to the petition that the Complainant, in conducting its business, sold and distributed products, the gross value of which exceeds $500,000, and the Complainant received goods and materials valued in excess of $50,000 shipped di-

rectly to it in the State of Alabama from points outside the State of Alabama.)

2. The labor organization named below claims to represent certain employees of the employer.

3. A question effecting commerce exists concerning the representation of certain employees of the employer, within Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the employer constitute a unit appropriate for the purpose of collective bargaining within Section 9(b) of the Act:[2]

> All full-time and regular part-time employees at Employer's Mobile, Alabama, retail operation, including office clerical employees and the grocery, produce, meat, drug warehouse and service station departments, excluding employees in the snack bar, professional employees[3], watchmen and/or guards and supervisors[4] as defined in the Act.

(A copy of the decision of Charles M. Paschal, Jr., Acting Regional Director for the Fifteenth Region, dated February 13, 1964, is attached as *Exhibit No. 2* and made a part hereof.

EIGHT

On March 9, 1964, a representation election was conducted among the employees in the unit found appropriate. (A copy of NLRB Form 707, NOTICE OF ELECTION, and NLRB Form 760, TALLY OF THE VOTES, *Exhibit No. 3* are attached hereto and made a part hereof.)

NINE

On March 13, 1964, the Complainant timely filed objection to the election. (A copy of said objection is attached hereto and made a part hereof as *Exhibit No. 4*).

TEN

After the objections were investigated and on April 16, 1964, the [18] Regional Director for the Fifteenth Region

issued a Supplemental Decision and Certification of Representation, certifying the Union as bargaining representative in the unit be found appropriate. (A copy of this is attached hereto and made a part hereof as *Exhibit No. 5*.)

ELEVEN

On April 25, 1964, Complainant filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative. (A copy of said Request for Review is attached hereto and made a part hereof as *Exhibit No. 6*.)

TWELVE

On May 22, 1964, the National Labor Relations Board, Washington, D.C., denied Complainant's Request for Review:

> Washington, D.C., 5-22-64
>
> Re: Weinacker Brothers, Inc. 15-RC-2850
>
> It is hereby ordered that the Employer's Request for Review of the Regional Director's Supplemental Decision and Certification of Representative, be and it hereby is, denied as it raises no substantial issue warranting review.
>
> By direction of the Board
>
> Howard W. Kleeb,
> Associate Executive Secretary
> 15-RC-2850
> GLP 1510-R

(A copy of this telegram of the decision of the National Labor Relations Board is attached hereto and made a part hereof as *Exhibit No. 7*.)

THIRTEEN

During the year 1964, Local 458, Retail Clerks International Association, AFL-CIO, and other members of the Union, filed the following Unfair Labor Charges with the National Labor Relations Board, Fifteenth Region:

Lorenzo Mathews, an individual	Case No. 15-CA-2486-1
Harry W. Wright, an individual	Case No. 15-CA-2486-2

Local 458, Retail Clerks International Association, AFL-CIO,	Cases No. 15-CA-2486-3
	15-CA-2486-4
	15-CA-2486-5
	15-CA-2486-6
	15-CA-2486-8
	15-CA-2486-12
Elizabeth Boyette, an individual	Case No. 15-CA-2486-15
Donald Harris, an individual	Case No. 15-CA-2486-17
Jack Willis Smith, an individual	Case No. 15-CA-2486-18
Local 458, Retail Clerks International Association, AFL-CIO,	Case No. 15-CA-2501

These unfair labor charges allege that the Complainant, Weinacker's, during the period of December, 1963, through April, 1964, through a Supervisor, violated Section 8(a)(1) of the National Labor Relations Act by certain specified acts of interrogation, threats, surveillance, [19] and the promulgation and enforcement of an unlawful no-solicitation rule.

FOURTEEN

The Respondents, in their unfair labor charges, also allege the discharge and violation of Section 8(a)(3) of the National Labor Relations Act of a number of employees during this period of time.

Respondents filed other petitions further alleging additional violations of Section 8(a)(3) of the National Labor Relations Act by the Complainant in providing for less employment for certain employees than they normally received prior to the National Labor Relations Board election.

Respondent-Union also filed unfair labor charges with the National Labor Relations Board, Fifteenth Region, during the year 1964 alleging violations of Section 8(a)(5) of the National Labor Relations Act, based on the following:

a. The failure of the Complainant, Weinacker's to meet with the Union subsequent to the union certifica-

tion on April 20, 1964, from that date until August 11, 1964.

b. Failure of Complainant to furnish information requested by the Union.

c. Complainant's unilateral changes in terms and conditions of employment of employer in the unit without notification to the bargaining union.

d. Bad faith on the part of the Complainant in initially failing to meet with the Union as certified bargaining representative, and with any meeting of the union and failing to bargain in good faith.

FIFTEEN

On the 31st day of August, 1964, John F. LeBus, Regional Director of the National Labor Relations Board, Fifteenth Region, located at New Orleans, Louisiana, issued an order consolidating the cases, complaints, and the notice of hearing. (A copy of said Consolidation of Cases, Complaints and Notice of Hearing is attached hereto and made a part hereof as *Exhibit No. 8*)

SIXTEEN

On the 16th day of September, 1964, Fred A. Lewis, Acting [20] Regional Director, National Labor Relations Board, Fifteenth Region, issued an Amendment to the Complaint. (A copy of said Amendment is attached hereto and made a part hereof as *Exhibit No. 8-A*.)

SEVENTEEN

On the 30th day of September, 1964, John F. LeBus Regional Director of the National Labor Relations Board Fifteenth Region, issued an Order to the Amendment of the Complaint. (A copy of said Order is attached hereto and made a part hereof as *Exhibit No. 8-B*.)

EIGHTEEN

On the 10th day of September, 1964, the Complainant, Wemacker Brothers, Inc., filed with the National Labor Re

lations Board, Fifteenth Region, an Answer to the Complaint issued by the said Board. (A copy of the Answer is attached hereto and made a part hereof as *Exhibit No. 9-A*)

NINETEEN

On the 22nd day of September, 1964, the Complainant, Wemacker's, Inc., filed an amendment to its answer before the National Labor Relations Board, Fifteenth Region. (A copy of said amended answer is attached hereto and made a part hereof as *Exhibit 9-B*).

TWENTY

On the 12th day of October, 1964, at 10:00 A.M., a hearing on the Unfair Labor Charges was heard by the Honorable Stanley Gilbert, Trial Examiner, Division of Trial Examiners, National Labor Relations Board, Washington, D.C. 20570. The decision of the Trial Examiner on the numerous unfair labor practices has not been rendered as of the filing of this plea.

TWENTY ONE

The Respondent Union, since the time of their certification as the bargaining agent on April 16, 1964, up until the present time, have always been willing and ready to negotiate wages, working conditions, etc., for the employees of Wemacker's that are included in the Unit set up by the National Labor Relations Board. The Company has refused to bargain in good faith and that refusal led to a strike which was started by the Respondents on the 12th day of December, 1964.

TWENTY TWO

At all times during the strike from December 12, 1964 up until the present time the strike has been carried out in accordance with Federal laws and the laws of the State of Alabama. At no time has there [21] been any force or violence resulting from the peaceful picketing on the part of the Respondents.

TWENTY-THREE

Complainant's business affects interstate commerce within the meaning of the National Labor Relations Act, and its labor relations are subject to the exclusive jurisdiction of the National Labor Relations Board

TWENTY-FOUR

Respondent further shows that their activities constitute concerted activity for their mutual aid and protection, the right to engage in which is guaranteed and protected by the National Labor Relations Act (29 USC 157, 163.)

TWENTY-FIVE

Respondent further shows the court that Title 29, Paragraphs C-1 and C-2 read as follows

> "C-1 The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant exercise of this jurisdiction Provided, that the Board shall not decline to assert jurisdiction over any labor dispute of which it would assert jurisdiction under the standard prevailing upon August 1, 1959."
>
> "C-2 Nothing in this subchapter shall be deemed to prevent or bar any agency of the courts of any state or territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands) from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to Paragraph (1) of this subsection, to assert jurisdiction As amended September 14, 1959, Public Law 86-257, Vol 7, Paragraph 701(a) 73 Statute 551."

TWENTY-SIX

Respondent has shown that the National Labor Relations Board assumed jurisdiction over the subject matter of Com-

TWENTY-SEVEN

Respondent further shows that all their activities have been legal under Federal law and Alabama law and to enjoin the same would infringe upon the rights of the Respondents herein and all the members of the Respondent Local 458, Retail Clerks International Association, AFL-CIO, [22] under the First and Fourteenth Amendment to the Constitution of the United States.

TWENTY-EIGHT

Respondents further show that since the National Labor Relations Board had assumed jurisdiction in this case and therefore pre-empted the jurisdiction of the Circuit Court of Mobile County, Alabama, for this Honorable Court to assume jurisdiction to grant relief on Complainant's bill of injunction or Complainant's amended bill would be unconstitutional and invalid and in derogation of the authority granted to the Congress of the United States by Article I, Section 8, Paragraph 3, of the Constitution of the United States to regular interstate commerce, and of Article VI, Paragraph 2, of the Constitution of the United States providing that the Constitution and laws of the United States are the supreme law of the land, and anything in the Constitution or law of any state to the contrary notwithstanding because pursuant to such power the Congress has assumed jurisdiction over the subject matter of the bill of injunction and has empowered the National Labor Relations Board to grant relief with respect thereto by enacting the National Labor Relations Act, as amended, 29 USC 151, et seq.)

WHEREFORE, Respondents pray that this plea be considered and sustained and that Complainant's bill for an injunction be dismissed, and the temporary restraining order heretofore issued on the amended complaint be dissolved and that the original complaint and amended bill of complaint be dismissed and that damages and costs be assessed upon the Complainant.

WHEREFORE, Respondents further pray the court that, if they are mistaken in the relief sought or should other relief be appropriate or be shown proper, they pray such other, further and additional relief as they may show themselves entitled to receive, premises considered.

Respectfully submitted,

Simon and Wood
By s/ Otto I. Simon
Solicitor for Respondents

STATE OF ALABAMA)
COUNTY OF MOBILE)

Personally appeared before me, the undersigned Notary Public for [28] the State of Alabama-at-Large, Clifford Taggart, Business Agent of Local 158 of the Retail Clerks International Association, AFL-CIO, who, after being first duly sworn, deposes and says that the facts alleged in the above and foregoing Plea to the Jurisdiction are true.

s/ Clifford Taggart

Sworn to and subscribed before me on this the 24th day of January, 1963.

s/ James C. Wood
Notary Public, State of
Alabama at Large

[Certificate of Service Omitted in Printing]

RESPONDENT'S EXHIBIT NO. 1

Form NLRB 502 (3-55) — Form approved Budget Bureau No. 64-R002.9.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with section 9(f), (g), and (h) of the National Labor Relations Act [illegible]

Do Not Write in This Space
Case No. 15-RC-2850
Date Filed Dec. 19, 1963
Compliance Status Check By:

INSTRUCTIONS. Submit an original and four(4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

SUBMISSION OF PROOF OF INTEREST. Except when this Petition is filed by an employer under section 9(c)(1)(B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization of membership application cards or other documentary evidence signed by employees, together with an alphabetical list of their names.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper [24] authority.

1. Purpose of this Petition (Check only the one box which is appropriate)

A. X RC - CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION)
A substantial number of employees wish to

be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9(a) and (c) of the act.

B. RM- REPRESENTATION (EMPLOYER) One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.

C. RD- DECERTIFICATION. A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.

D. UD- WITHDRAWAL OF UNION SHOP AUTHORITY. Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded

2. Name of Employer: Weinacker's
Employer Representative to Contact: Bob Weinacker
Phone No.: 473-7414

3. Addresses(es) of Establishment(s) Involved (Street and number, city, zone, and State):
1550 Government Street, Mobile, Alabama.

4a. Type of Establishment (Factory, mine, wholesaler, etc.); 4b. Identify Principal Product or Service
Grocery, Drugs Service Station and Grocery Warehouse.

5. Description of Unit Involved (If more space is needed continue on another sheet)

Included
All full and regular part time employees working in the Grocery, Produce, Meat, Drug, Warehouse, Filling Station and office

Excluded

Store Managers and Employees working in the Snack Bar and Watchmen and Guards and Supervisors as defined in the act.

6a. Number of Employees in Unit: 40.

6b. Is this petition supported by 30% or more of the employees in the unit? Yes.

(If you have checked box 1A (RC) above, check and complete EITHER item 7a or 7b, whichever is applicable):

X 7a. Request for recognition as Bargaining Representative was made on December 18, 1963 and employer declined recognition on or about December 18, 1963. (If no reply received, so state)

7b. * * *

8. Recognized or Certified Bargaining Agent (If there is none, so state): [25] None.

[Filing date illegible]

9. Date of Expiration of Current Contract, if any (Show month, day and year): None.

* * * * *

11. Parties or Organizations Other Than Petitioner Which Have Claimed Recognition as Representatives, and Other Union Interested in the Employees Described in Item 5 Above (If none, so state): None.

12. If you have checked box 1A(RC) above, list locals or other affiliates of Petitioner having or soliciting members among the employees in the unit involved, or which will serve such employees in the event the Petitioner is certified as their representative (If none, so state): None.

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Retail Clerks International Association AFL-CIO Local Union No. 458

(Petitioner and affiliation, if any)

By s/ Clifford E. Taggart, Secy-Tres.
(Signature of representative of person filing petition)

Address: Clifford E. Taggart
No. 1 South Lawrence Street,
Mobile, Alabama Phone: 432-3330

Willfully False Statement on this Petition can be punished by Fine and Imprisonment (U.S. Code, Title 18, Section 1001) [illegible]

RESPONDENT'S EXHIBIT No. 3

Form NLRB 4477 5-61

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Weinacker Brothers, Inc., Employer[1]

and

Retail Clerks International Association, AFL-CIO, Local Union No. 458, Petitioner — Case No. 15-RC-2850

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. His rulings made at the hearing are free from prejudicial error and are affirmed.

Pursuant to Section 3(b) of the National Labor Relations Act, the [26] Board has delegated its powers herein to the undersigned Regional Director.

Upon the entire record, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

[1] The name of Employer appears as corrected at the hearing.

2. The labor organization(s) named below claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act:[2]

> All full-time and regular part-time employees at Employer's Mobile, Alabama, retail operation, including office clerical employees and the grocery, produce, meat, drug warehouse and service station departments, excluding employees in the snack bar, professional employees[3] watchmen and/or guards and supervisors[4] as defined in the Act.

[2]The unit is in accordance with the stipulation of the parties.

[3]The parties stipulated at the hearing that the pharmacists are supervisors within the meaning of the Act. Subsequent to the hearing, Employer requested, with a supporting affidavit, that it be permitted to withdraw from the stipulation on the grounds that its counsel was not informed of the duties of the pharmacists at the time of the hearing, and subsequent information indicated that the pharmacists were not supervisory. This request is granted. However, the pharmacists do fill prescriptions, and, consequently, are professional employees within the meaning of the Act. Under Section 9(b)(1) of the Act, I am precluded from including professional employees in a unit with non-professional employees, unless a majority of the professional employees vote for inclusion in the unit. Ordinarily, a self-determined election among the pharmacists would be directed. However, since Petitioner does not seek to represent the professional employees and has made no showing of interest among them, I shall not conduct a separate election among the pharmacists, but shall exclude them from the unit. *Liggett Drug Company, Inc.*, 110 NLRB 949, 950.

[4]The parties stipulated that the office manager, drug manager, service station manager, meat market manager, grocery manager, and

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and Place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike, commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been reinstated before the election date, and employees engaged in an economic strike which commenced more than twelve (12) months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Retail Clerks International Association, AFL-CIO, Local Union No. 455.

Dated February 27, 1964

(check mark)
at New Orleans, Louisiana

/s/ Charles M. Paschal, Jr.
Acting Regional Director for
the 15th Region

RESPONDENT'S EXHIBIT NO. 1

NLRB-0[illegible]

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

RIGHTS OF EMPLOYEES

Under Section 7 of the National Labor Relations Act employees have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

PURPOSE OF ELECTION

An election by secret ballot will be conducted under the supervision of the Regional Director of the National Labor Relations Board among the eligible voters described herein, to determine the representative, if any, desired by them for the purpose of collective bargaining with their employer.

SECRET BALLOT

The election ballots by SECRET ballot. Voters will be allowed to vote without interference, restraint or coercion

near the ice cream case, [37] which is some 12 to 15 feet from the doors into the voting area. While Stuckey was standing there, a Mr. Turner and his wife came up. Turner's wife proceeded ahead into the voting room.[4] Mr. Turner and Mr. Stuckey talked for awhile near the ice cream case. Mr.[5] Tew was then sent by assistant supervisor Weaver to have Turner and Stuckey move away from the area because Mr. Weaver considered they were too close to the voting room entrance. After a short discussion with Mr. Tew,[6] Turner and Stuckey went to the drugstore section of the store and had coffee. Staying possibly 5 to 10 minutes, the two men then returned to the area near the food case, about 12 feet from the entrance to the voting room. Soon thereafter Mr. Weaver again sent Mr. Tew back to have them move away. Mr. Tew on this occasion had the Employer's observer, Elliott, and Petitioner's observer, Smith, with him. After a short discussion wherein Tew told Stuckey he didn't have to leave, but only move away from the area near the voting room, Stuckey and Turner went to the front of the store.

Stuckey was known by possibly half of the eligible voters, who might have met him at union meetings. Approximately one-half of the eligible voters had voted in the first session, leaving approximately one-half to vote in the second session. Stuckey[7] had no identification visible which would link him to the Petitioner: he did not wear any insignia, he did not hand out leaflets, and he did not electioneer. There was no evidence submitted and none was found during the investigation to establish that

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[4]Mildred Turner cast a challenged ballot and the undersigned has sustained the challenge. See challenge section of this decision. Her husband has no connection with Weinacker's. He is employed by the U. S. Government and is not a member of any union or in any manner an agent of the Petitioner.

[5]Also a challenged voter.

[6]No electioneering occurred.

[7]Neither did Turner.

Stuckey electioneered or discussed the Union or the election with anyone. There was no indication that he was attempting to see into the voting area. The evidence only shows that a local union official brought a voter to the polls and remained until the voter cast his ballot, at which time he left. It should be noted that at no time was Stuckey in any non-public area of the store, nor was he at any time in the voting area.

The Board has in many cases refused to set an election aside where, as here, there was no more than the mere presence of a union representative near the polling place.[8] The Employer's counsel cites two [38] cases in support of the objection: *Southwestern Electric Service Company v. N. L. R. B.*, 194 F.2d 939 (C.A. 5), denying enforcement, and *Detroit Creamery Company, et al.*, 60 NLRB 178. The undersigned finds these cases are inapplicable because in the Southwestern case electioneering was found. In the Detroit Creamery case the Board inferred electioneering on the part of a union representative since there was no explanation for his presence in the company's plant. In the instant case Stuckey was in the public area of a store and his presence is fully explained.

The Board has in many cases refused to set aside an election because of a voter being transported to the polls by an agent of the union or the employer.[9]

Based upon the above, it is found that Objections Nos. 1 and 2 do not raise substantial or material issues affecting the results of the election. They are therefore overruled.

Objection No. 3

The Employer furnished some testimony that there were more "non-shoppers" in the store the day of the election

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[8] *Charles T. Brandt, Inc.*, 118 NLRB 956; *Houston Shell and Concrete Division McDonough Co.*, 118 NLRB 1511; *The Rackle Company of Texas* 117 NLRB 462; *Kaiser Services*, 11 NLRB 1093

[9] *Charles T. Brandt, INc.*, 118 NLRB 956; *Garner Auction Service Corporation*, 114 NLRB 293; *"M" System Inc.*, 118 NLRB 502; *Gastonia Combed Yarn Corporation*, 109 NLRB 585

than normally. There is no evidence that these non-shoppers were union employees. The only evidence submitted or found which would in any way identify these people was that furnished by Robert E. Tew, who stated that he saw three men with green ties and one with a green name tag like the name tags worn by National Food employees.[10] There was no other identification furnished of any alleged "non-shoppers" nor was there any evidence found that could in any way identify the "non-shoppers" or associate them in any way with the Petitioner. No evidence submitted or found indicated any of these people talked to any voter nor was there any evidence that they were out of the public portion of the store. Also as discussed in Objections Nos. 1 and 2 above, the mere presence near the polls of a union representative without more does not warrant setting aside an election.

In view of the lack of identification and lack of any evidence of electioneering by any of the alleged "non-shoppers," the undersigned finds that Objection No. 3 does not raise substantial or material issues [39] affecting the results of the election. It is therefore overruled.

Objection No. 4

The investigation revealed that there had been considerable discussion at the pre-election conference as to voting eligibility, especially the eligibility of a sizable number of people who first became employed after the eligibility date of February 8, 1964. Petitioner's observer, Jack Smith, was not present, but Petitioner's observer, Williams, was present at this conference. The standard election notices had been posted which clearly set out the payroll eligibility date to be that ending February 8, 1964. Early in the first voting session, observer Jack Smith, as instructed by the Board agent, was standing at the entrance door into the voting area. Thelma Burroughs came up to cast her ballot and

[10] The witness, however, did not see the word "National" on the tags or on anything else.

Smith recognized her as having started to work for the Employer after the eligibility date of February 8, 1964. Smith told her she could not vote because she came to work after February 8, 1964.[11] She told Smith that Mr. Weaver told her she could vote if she wanted to. Smith then told her to go ahead in and vote. She proceeded to vote a challenged ballot.

Also while Smith was watching the door to the voting area, a second voter, Evelyn B. Langham, came to the door to vote. Observer Smith told Langham she couldn't vote because she came to work after the 8th of February, 1964.[12] She told him she wanted to vote, whereupon he told her she could vote challenge. She then, after the line cleared, went in and cast her challenged ballot.

There was no other evidence relating to this objection.

The observers Smith and Elliott had been put in charge of the doors for the purpose of letting in a few voters at a time. Smith apparently misunderstood his function, though he was no doubt aware of the eligibility date and was aware that these two employees were new with the Employer. The undersigned finds that while this observer did misunderstand his function, he did nevertheless allow the voters to enter and they cast challenged ballots. He did not cause the challenges nor did he voice any threats or promises or electioneer in any way. The Board agent allowed them to vote subject to challenge, explaining to them the reason for the challenge.[13]

[40] The undersigned finds that Objection No. 4 does not raise substantial or material issues affecting the results of the election. It is therefore overruled.

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[11] The investigation revealed she was employed February 22, 1964. The undersigned has sustained the challenge to her ballot in a subsequent section of this decision.

[12] The investigation revealed that Langham was employed February 20, 1964. The undersigned has sustained the challenge to her ballot.

[13] See *Miami Paper Board Mills, Inc.*, 115 NLRB 1431

THE CHALLENGED BALLOTS

The bargaining unit as found by the Acting Regional Director in his Decision and Direction of Election, issued February 13, 1964, is as follows:

> All full-time and regular part-time employees at Employer's Mobile, Alabama, retail operation, including office clerical employees and the grocery, produce, meat, drug, warehouse and service station departments, excluding employees in the snack bar, professional employees, watchmen and/or guards and supervisors as defined in the Act.

Employees eligible to vote in the election were those in the unit who were employed during the payroll period ending February 8, 1964.

Of the 27 voters challenged, 20 were challenged by the Board agent who conducted the election because their names failed to appear on the eligibility list.

Jerry S. Shields

Jerry Shields was employed February 7, 1964, as a bag boy, an eligible classification. He was still employed in this classification the date of the election. I find that Shields was eligible to vote in the election. Accordingly, the challenge to his ballot is overruled.

Robert E. Tew

Robert Tew was referred to as stock clerk, but investigation revealed that his classification was head stock clerk at the time of the election. He was employed February 3, 1964, and was still employed the date of the election. Since he is a new employee, his authority and duties are uncertain.

Tew works throughout the grocery area of the store and in the warehouse. He reports directly to Mr. Weaver, the assistant superintendent. Tew is responsible for reordering merchandise and seeing that the shelves are stocked at all times. He orders the routine items, but cannot on his own order new type items. He can change selling prices on

items of they are marked wrong. He determines the quantity of merchandise to be ordered.

Mr. Weaver reports directly to the owners of the store. Mr. Weaver actually operates like the typical chain store manager. The store [41] has no assistant manager. A man is, however, now being groomed with the thought he may become assistant manager. It also appears that Tew's authority has decreased since the hiring of this man. Some of the employees think of Tew as assistant manager, though Mr. Weaver says Tew is not a supervisor. He can arrange and change arrangements of merchandise for display without consulting anyone in order to sell it. He at times closes the store at night and at times opens the store in the morning. There are two stock clerks who work with him. Tew is paid $100 per week straight salary whereas the other stock clerks and most other employees are paid $1 per hour.

At times most everyone in the store goes to Tew for directions and answers to questions. He does not have to keep track of the hours he works, but does keep a record of the hours the other stock clerks work. He cannot hire or fire. The Petitioner contends Tew is a supervisor; the Employer contends he is not a supervisor. In view of Tew's limited length of service prior to the election and in view of the credibility issue, I make no determination as to whether Tew is a supervisor within the meaning of the Act. Other challenges are sustained, leaving Tew's ballot no longer determinative.

THELMA BURROUGHS, DON G. CARNLEY, HELEN L. CLARKE, RONALD L. CLINGLER, WILBURN ELLIOTT, WILLIE MAE GRIMES, JAMES A. HANNON, CAROLYN J. HARTSELL, GLORIA P. LANE, EVELYN B. LANGHAM, TOMMY B. LEE, CHARLES R. MAYHALL, RENLEY L. PRIEST, LUCILLE K. READY, AND C. H. WEEKLEY

These 15 employees who were challenged by the Board agent were employed after the eligibility date of February 8, 1964. They were employed the dates set out opposite their names, but prior to the date of the election. They were still employed as of the day of the election. Shown is their job classification at the time of the election. All were in eligible classifications.

Thelma Burroughs	February 27, 1964	Cashier
Don G. Carnley	February 14, 1964	Stock boy
Helen L. Clarke	March 5, 1964	Cashier
Ronald L. Clingler	February 26, 1964	Stock boy
Wilburn Elliott	February 26, 1964	Warehouse receiving
Willie Mae Grimes	February 11, 1964	Meat wrapper
James A. Hannon	March 7, 1964	Bag boy
Carolyn J. Hartsell	February 18, 1964	Cosmetics dept.
Gloria P. Lane	February 24, 1964	Asst. office mgr.
[42] Evelyn B. Langham	February 28, 1964	Cashier
Tommy B. Lee	February 21, 1964	Bag boy
Charles R. Mayhall	February 14, 1964	Bag boy
Renley L. Priest	February 26, 1964	Service station
Lucille K. Ready	March 3, 1964	Meat wrapper
C. H. Weekley	February 10, 1964	Meat dept.

As these 15 employees were not employed on the eligibility date, I find that they were not eligible to vote in the election. Accordingly, the challenges to these ballots are sustained.

Sadie B. Burgess and Gladys A. Hilburn

The 18th and 19th voters challenged by the Board agent were Sadie B. Burgess, a drug department employee, and

Gladys A. Hilburn, an office clerical employee. Both were in eligible classifications.

Burgess was employed November 9, 1963, and, according to the Employer, she was hired for the Christmas season. She was discharged right after inventory was taken February 4, 1964, 4 days before the eligibility date. She has not been reemployed.

Hilburn was employed January 13, 1964, and, according to the Employer, she was hired to fill in for a Mrs. Ezell who was sick. Upon the return of Ezell, Mrs Hilburn was discharged February 25, 1964, after the eligibility date, but before the election. She has not been reemployed.

The Petitioner does not necessarily agree that these employees were discharged for the reasons alleged by the Employer. However, there have been no charges filed alleging that their discharges were a violation of the Act. As neither of these employees was employed on the date of the election, I find that they were not eligible to vote in the election. Accordingly, the challenges to the ballots of these two voters is sustained.

Fred L. Stokes

The 20th voter challenged by the Board agent was Fred L. Stokes, a part-time meatcutter. This was an eligible classification.

The Employer's records disclose that Stokes began work for the Employer on or about June 30, 1962, as a part-time butcher. From June 30, 1962, until January 12, 1964, Stokes worked several hours nearly every weekend. However, due to employment of a new meat market manager and a new full-time meatcutter, along with a decline in business, the Employer [43] has not needed Stokes since January 10, 1964. There is no indication that Stokes' services will be needed in the future. Stokes is employed full time 5 days per week at the Brookley Field Commissary. There is no expectancy that Stokes will work further for the Employer. As Stokes was not employed at the time of

the election or on the eligibility date, I find that he was not eligible to vote in the election. Accordingly, the challenge to his ballot is sustained.

Forrest A. Dalton

There was one voter challenged by the petitioning Union. That challenge was to the ballot of Forrest A. Dalton, a drug department employee. The Petitioner contends that Dalton was a professional employee within the meaning of the Act. Dalton began work for the Employer in November, 1963 and has worked continuously for the Employer ever since. His position is that of front end drug clerk. He checks merchandise, assists customers, watches for shoplifters, fixes displays, and sells merchandise. He has no supervisory authority. He is not a registered pharmacist nor has he received any academic training in pharmacy. He does not fill prescriptions and seldom goes into the pharmacy department. He does the same type work as Anna Wilson, an eligible employee who is a drug clerk. As Dalton is not a professional employee but rather a drug clerk whose position is within the unit, I find he was eligible to vote in the election. Accordingly, the challenge to Dalton's ballot is overruled.

Floyd D. Devitt, Burl Dock, Alma E. Garrison, Carlos Harris, Donald J. Johnson, and Mildred E. Turner

The remaining six challenged voters were challenged by the Employer, who alleged in each case that the voter was "not now an employee." Following are listed the six voters along with the last date each worked for the Employer. Also listed are their job classifications. Each of the employees was employed in an eligible classification.

Floyd D. Devitt	February 12, 1964	Stock boy
Burl Dock	February 15, 1965	Truckdriver
Alma E. Garrison	February 16, 1964	Cosmetic dept.
Carlos Harris	February 12, 1964	Stock clerk
Donald J. Johnson	March 2, 1964	Stock clerk
Mildred E. Turner	February 10, 1964	Checker

Each employee was discharged on a date prior to the election. None of these voters has been reemployed.

The Petitioner does not necessarily agree that these voters were [44] discharged for the reasons alleged by the Employer. However, there have been no charges filed alleging that the discharged were a violation of the Act. As none of these voters were employed on the day of the election, I find they were not eligible to vote in the election. Accordingly, the challenges to the ballots of these six voters are sustained.

DETERMINATION

The undersigned finds that Objections Nos. 1 through 4 do not raise substantial or material issues affecting the results of the election, accordingly, the Employer's objections are overruled in their entirety.

The undersigned makes no determination as to the challenged ballot of *Robert E. Tew*.

The undersigned finds that *Forrest A. Dalton* and *Jerry S. Shields* were eligible to vote in the election. The challenges to their ballots are therefore overruled. However, as these ballots are insufficient in number to affect the results of the election, they will not be counted.

The undersigned finds that *Sadie B. Burgess, Thelma Burroughs, Don G. Carnley, Helen L. Clarke, Ronald L. Clingler, Floyd D. Devitt, Burl Dock, Wilburn Elliott, Alma E. Garrison, Willie Mae Grimes, James A. Hannon, Carlos Harris, Carolyn J. Hartsell, Gladys A. Hilburn, Donald J. Johnson, Gloria P. Lane, Evelyn B. Langham, Tommy B. Lee, Charles R. Mayhall, Renley L. Priest, Lucille K. Ready, Fred L. Stokes, Mildred E. Turner and C. H. Weekley* were not eligible to vote in the election. The challenge as to each of their ballots is therefore sustained.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that the Retail Clerks International Association, AFL-CIO, Local Union No. 458, has been des-

ignated and selected by a majority of all full-time and regular part-time employees at Employer's Mobile, Alabama, retail operation, including office clerical employees and the grocery, produce, meat, drug, warehouse and service station departments, excluding employees in the snack bar, professional employees, watchmen and/or guards and supervisors as defined in the Act, as their representative for the purposes of collective bargaining, and that pursuant to Section 9 (a) of the Act, the aforesaid organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment. [45]

Dated, April 16, 1964, at New Orleans, Louisiana.

John F. LeBus, Regional Director
Fifteenth Region
National Labor Relations Board

RESPONDENT EXHIBIT NO. 6

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTEENTH REGION

WEINACKER BROTHERS, INC.
Employer
and
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, LOCAL UNION No. 458
Petitioner

Case. No. 15-RC-2850

REQUEST FOR REVIEW
(of Regional Director's Supplemental Decision and Certification of Representative dated April 16, 1964)

[Received NLRB 15th REG. New Orleans, L.A., April 27, 8:43 AM, '64]

Johnston, Johnston and Courtney, Solicitors for Weinacker Brothers, Inc., By Bert S. Nettles

Appendix F

REQUEST FOR REVIEW

Ground I

A Substantial Question of Law and Policy Is Raised Because of the Departure From Officially Reported Board and Court Precedent.

(Authorities: *Detroit Creamry Co.*, 1945, 60 NLRB 178 16 Labor Relations Manuel 221; *Southwestern Electric Service Co. v. NLRB* (5th CCA, 1952) 194 F.2d 939).

Ground II

The Regional Director's Decisions on Substantial [46] Factual Issues Are Clearly Erroneous on the Record and Such Error Prejudicially Affects the Rights of Weinacker Brothers, Inc., a Party.

(Factual issues:

1. "he (Stuckey) did not electioneer", p. 4 of Supp. Decision;

2. "There was no evidence submitted and none was found during the investigation to establish that Stuckey electioneered. . ." p. 4 of Supp. Decision;

3. "It should be noted that at no time was Stuckey in any non-public area of the store. . .) p. 5 of Supp. Decision;

4. "nor was he (Stuckey) at any time in the voting area." p. 5, Supp. Decision.)

Summation Of Evidence And Rulings Bearing On The Issues

Summation is best had by quoting the following pertinent portion of pages, 2, 3, and 4 of the Regional Director's Supplemental Decision:

"The election herein was conducted in two sessions on the same day: the first session was from 1:30 p.m. to 2:30 p.m. and the second session was from 4:30 p.m. to 5 p.m. Both sessions were conducted in the same location, which was in the warehouse area of the Employer's store. Entrance to the warehouse area from the

public area can be made through one of three doors. Most voters, however, entered the warehouse through double swinging doors located in the northwest section of the public area of the store. Each of these doors has a glass window approximately 1 foot square located about 5 feet from the floor. The warehouse is poorly lighted. The voting table and booth were set up inside the warehouse some 15 feet from the double swinging doors, but at an angle from the doors, i.e., one looking straight through the glass would not see the voting table or booth. To be able to see into the voting area if the doors were closed, one would have to be in a precise line of sight as well as at a certain height. The testimony is that the doors were closed at least as much as they were open.

"Mr. James Stuckey, referred to in Objections Nos. 1 and 2, has for the last 2 years been president of Petitioner. Mr. Stuckey is also employed full time as a butcher for National Food Company at its Big 'D' Store in Mobile, Alabama. [47] Fred L. Stokes, referred to in Objection No. 2 is a former part-time meatcutter for the Employer.[1]

"On election day, between 4:15 p.m. and 4:25 p.m., some 5 to 15 minutes before the polls opened for the second voting session, Mr. Stuckey arrived at the Employer's store, having transported Mr. Stokes. These two men then walked toward the rear of the store. They stopped momentarily to look at the fresh meat display.[2] At this time Mr. Cecil Robertson, a Weinacker butcher on duty, and Mr. Colon Taylor, the Employer's market manager, walked up. Robertson and Stuckey had worked together at another store and Mr. Robertson introduced

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[1] Stokes cast a challenged ballot in the election and the undersgined has sustained the challenge. See challenge section of this decision.

[2] Interested because both are butchers.

Taylor to Stuckey. After an exchange of pleasantries, Stokes walked away alone and through the swinging doors into the voting area.[3] Stokes was advised the polls were not yet open, so he returned to the public area of the store. Sometime thereafter Stokes and Stuckey walked again toward the voting area, but Stuckey stopped at the frozen food case, some 7 to 10 feet short of the swinging doors leading to the voting area, and Stokes again entered the voting area alone. Due to the number of challenged ballots being cast, Stokes was in the voting room some 15 minutes, after which time he came out. By this time Mr. Stuckey had moved to the front of the store. Stuckey and Stokes then left the store and Stuckey did not return to the store until the polls had closed.

"While Stokes was in the voting room, Stuckey remained for a time near the frozen food case and then for a period near the ice cream case, which is some 12 to 15 feet from the doors into the voting area. While Stuckey was standing there, a Mr. Turner and his wife came up. Turner's wife proceeded ahead into the voting room.[4] Mr. Turner and [48] Mr. Stuckey talked for awhile near the ice cream case. Mr. Tew[5] was then sent by assistant supervisor Weaver to have Turner and Stuckey move away from the area because Mr. Weaver considered they were too close to the voting room entrance. After a short discussion with Mr. Tew,[6] Turner and Stuckey went to the drugstore section of the store and had coffee. Staying

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[3]Neither the Union nor the election was mentioned in this short discussion.

[4]Mildred Turner cast a challenged ballot and the undersigned has sustained the challenge. See challenge section of this decision. Her husband has no connection with Weinacker's. He is employed by the U.S. Government and is not a member of any union or in any manner an agent of the Petitioner.

[5]Also a challenged voter.

[6]No electioneering occurred.

possibly 5 to 10 minutes, the two men then returned to the area near the food case, about 12 feet from the entrance to the voting room. Soon thereafter Mr. Weaver again sent Mr. Tew back to have them move away. Mr. Tew on this occasion had the Employer's observer, Elliott, and Petitioner's observer, Smith, with him. After a short discussion wherein Tew told Stuckey he didn't have to leave, but only move away from the area near the voting room, Stuckey and Turner went to the front of the store.

"Stuckey was known by possibly half of the eligible voters, who might have met him at union meetings. Approximately one-half of the eligible voters had voted in the first session, leaving approximately one-half to vote in the second session."

Argument As To Evidence And Rulings Bearing On The Issue

The aforesaid factual issues 1 and 2 are, respectively, that "he (Stuckey) did not electioneer", p. 4, and "There was no evidence submitted and none was found during the investigation to establish that Stuckey electioneered. . .": p. 4. But what does the Regional Director's Supplemental Decision itself reflect as above set out?

First, Stuckey, the non-employee president of petitioning union who was known by "possibly half of the eligible voters, who might have met him at union meetings", transported and accompanied a voter to the vicinity of the voting place "some 5 to 15 minutes before the polls opened for the second voting session." *Second*, [49] Stuckey walked through the length of the Employer's store whereby he could be observed by nearly if not all of the voters (including the "approximately one-half of the eligible voters" who shortly thereafter cast their ballots"); and it should be remembered that "Stuckey was known by possibly half of the eligible voters, who might have met him at union meetings" and that those who knew Stuckey might very well have advised their fellow employees of his identity and

position. *Third*, we know that Stuckey was "introduced" to an eligible voter, and that an "exchange of pleasantries" then occurred between the non-employee president of petitioning union and a newly met eligible voter, apparently in full view of many other eligible voters. To digress for a moment, we submit that one of the most effective means of electioneering is just such an "exchange of pleasantries", particularly when by the candidate himself during or immediately prior to the election and when in the vicinity of the polling place; and that it makes no difference whether he later says no mention was made of the union or the election.

Fourth, Stuckey stationed himself at a point in the immediate vicinity of the polling place where employees would have to pass him on their way to cast a ballot, unless they took a less direct and more circuitous route; and we are informed that "most voters' went through the swinging doors near which Stuckey had stationed himself (page 2 of the Supp. Decision). The first full paragraph on page 4 of the Supplemental Decision dwells at length on matters occurring while Stuckey was outside the doors in the immediate vicinity of the polling place, such paragraph being set out in full above, including the fact that Stuckey left the area once on request but then returned to a point even closer to the polling place. Thereafter we are informed by the Supplemental Decision (page 4 thereof) that "After a short discussion wherein Tew (as directed by the Assistant Supervisor of the Employer) told Stuckey he didn't have to leave, but only move away from the area near the voting room, Stuckey and Turner went to the front of the store."

Omitted from the Supplemental Decision are the facts as reported during the administrative investigation relating to Stuckey's general belligerent manner upon being requested to move [50] (asking Tew whether he was "asking me to leave or telling me to leave the door" as written by Tew in his statement of March 9, 1964, and "are you telling me to leave or asking me" as reported by Employer's observer

Elliott in his affidavit of March 9, copies of both the statement and affidavit being furnished representatives of the NLRB during the administrative investigation) and also the fact that Stuckey's identity as president of the petitioning union was then unknown to either Mr. Weaver, the assistant supervisor, or Mr. Tew, or Mr. Elliott, the Employer's observer.

Fifth, although the Supplemental Decision only casually mentions that upon finally leaving, "Stuckey did not return to the store until the polls had closed", information furnished the NLRB investigative team related that after the polls were closed Stuckey came back into the store and walked through the store to the voting place (where preparations were being made for the counting of the ballots) and there engaged in conversation with other representatives of the petitioning union, at which time Stuckey's identity and position within petitioning union first became known to representatives of the employer.*

We respectfully submit that from the conduct of Stuckey as above set out, there is no question but that his intent and his actions were those of electioneering and in direct violation of the rules promulgated by the Board and plainly stated in the Notice of Election, all of which prejudicially affected the rights of the Employer. We further submit that the Regional Director's decisions on substantial factual issues as mentioned above are clearly erroneous on the record and that such error prejudicially affects the rights of the Employer.

*The above argument is likewise applicable to factual issues 3 and 4 previously raised herein by the Employer, and relates to the point that Stuckey's purpose earlier at the store of the Employer was definitely that of electioneering.

Argument As To Ground I. That "A Substantial Question Of Law And Policy Is Raised Because Of The Departure From Officially Reported Board and Court Precedent."

We respectfully invite the Board's attention to the decisions of *Southwestern Electric Service Co. v. NLRB*, 5th CCA 1952, 21 Labor Cases 66, 820, 194 F.2d 939; and *Detroit Creamry Co.*, 1945 60 NLRB 178, 16 Labor Relations Manual 221.

The objectionable conduct by the union official not an employee in the *Southwestern* case, supra, was that he was in the polling area "at least 10 or 15 minutes before the polls were open, [51] and remained in the polling area for a comparatively long time after the voting began, *giving directions to the union officers and to the voters*". Likewise, in the instant fact situation a union official not an employee (Mr. Stuckey) appeared at the vicinity of the polling place shortly before the polls were opened at 4:30 p.m. on March 9, and he remained in such area for a comparatively long time after the voting began.

The "directions" given in the *Southwestern* case, supra, were simple admonitions to two employees to "go ahead and vote" and to "go over and vote". Whereas, here Mr. Stuckey transported and accompanied a voter by the name of Fred L. Stokes to the vicinity of the polling place, with the obvious inference from Mr. Stuckey's actions alone being tantamount to telling Mr. Stokes to "go ahead and vote". Also, Mr. Stuckey placed himself immediately outside the door leading into the polling area. Furthermore, he engaged in conversation with several voters who presumably had seen him at meetings sponsored by the petitioning union. Irregardless of statements taken subsequent to the filing of objections as to the nature of said conversations, it is manifest that the very presence of Mr. Stuckey in the vicinity of the polling area, his having transported and accompanied Mr. Stokes to such area, and his conversation with other employees was electioneering "at or near the polling place". That Mr. Stuckey's purpose was elec-

tioneering is further shown by his *remaining in the area until after the polls were closed and then walking back* to the voting booth (where preparations were being made for the counting of the ballots) and engaging in conversation with other representatives of the petitioning union, at which time Mr. Stuckey's identity first became known to the representatives of the employer.

This *Southwestern* decision, supra, has since been cited by two 1954 Fifth Circuit decisions as authority and precedent in denying enforcement of NLRB orders directing employers to cease and desist from refusing to bargain collectively with unions having won representation elections wherein objections had been filed. See *NLRB v. Trinity Steel Co.*, 5th CCA 1954, 214 F.2d 120; and *NLRB v. West Texas Utilities Co.*, [52] 5th CCA 1954, 214 F.2d 732.

Furthermore, in a fact situation almost on the proverbial "all fours" with the instant case, the NLRB ruled that conduct of union's vice president in visiting employer's plant during conduct of election and in talking to some of its empolyees at such time constituted violation of a material election rule and interfered with employees' freedom of choice of a bargaining representative. *Detroit Creamry Co.*, supra. There the Board explained as follows:

"The election directed by the Board was scheduled during the hours from 3 p.m. to 6 p.m. At 2 p.m. on the day of the election, one William H. Gibson, vice president of the CIO was in the company's plant among the production employees on the first floor. At 3:30 p.m. on the same day, he was among the production employees on the second floor, where he talked to some of them, although the nature and substance of the conversations are unknown. Although there is no evidence to indicate that Gibson at any time, was in the room where the balloting was conducted or at any place where he could be visible to an employee from inside the balloting room, he was, nevertheless, stationed at a point on the second floor where employees leaving the production

room on the second floor to cast their ballots would have to pass him on the way to the stairs leading to the first floor and the balloting room. Shortly after 3:30 p.m. at the request of the Board's agent as a result of complaints by the AF of L, Gibson left the company's plant. Gibson was not an employee of the Company and had no business with the Company warranting his presence in the plant on the day of the election.

"One of the rules promulgated by the Board and plainly stated in the Notice of Election, copies of which were posted in conspicuous places in and about the polls prior to the election, provides that "Voters will be [53] allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place."

It is observed that the Board in its *Detroit Creamry Co.*, decision, supra, placed on emphasis on the nature and substance of the conversations (the same being "unknown"), but indicated that the mere fact that the conversations took place was inference enough of electioneering.

We respectfully submit that here it matters not whether the business of the employer is a "plant," a retail store, or otherwise. The crucial point for consideration is the conduct and actions of the union official at the election itself and in the area of the polling place. We submit that *any* of the following actions of Mr. Stuckey, standing alone and removed from the others, would in itself be sufficient grounds for setting aside the election: (1) transporting and accompanying a voter to the vicinity of the polling place, (2) stationing himself at a point in the immediate vicinity of the polling place where employees would have to pass him on their way to cast a ballot, and (3) conversing with employees immediately before and *during* the actual conduct of the election. In considering the totality of Mr. Stuckey's conduct, including *all* of the aforementioned actions and also Mr. Stuckey's remaining in the area until after the polls were closed and then walking back to

the voting booth (where preparations were being made for the counting of the ballots) and engaging in conversation with other representatives of the petitioner, there is no question but that his purposes and his deeds were those of electioneering and in direct violation of the rules promulgated by the Board and plainly stated in the Notice of election.

As cogently expressed in the *Southwestern* decision, supra "If the tables were turned, and a representative of the Company had done exactly what was done here, with a result favorable to the Employer, the election should be set aside; and the same rule must apply in this case". Had Mr. R. M. Weinacker, Jr., accompanied an employee to the vicinity of the polling place, stationed himself at a point in the immediate vicinity of the polling place where employees would have to pass him on their way to cast a [54] ballot, and conversed with employees in the vicinity of the polling area during the time of the election and for no business purpose; and had the petitioning union lost the election, there would be no question but that such election would be set aside on objection of the union. We submit that the same rule should apply in respect to the activities of the non-employee president of the petitioning union.

We therefore respectfully submit that the Regional Director's Supplemental Decision and Certification of Representatives, dated April 16, 1964, should be set aside, and that this Board should likewise set aside subjection election of March 9, 1964.

Johnston, Johnston, & Courtney

Johnston, Johnston, & Courtney
Solicitors for Weinacker Brothers, Inc.
By: /s/ Bert S. Nettles

[Proof of service omitted]

RESPONDENTS EXHIBIT No. 7

[Received New Orleans, La., 1964, May 22, P.M. 3:01]

PUBLIC BUILDINGS SERVICE COMMUNICATIONS

[55] XDXXXBQ-075 M, AXXXBQ-076, WBC020, MXA102, MX WWAL 19 BB, MX 5 BNO

BNO John F. Lebus Dir NLRB New Orleans La –
BNO Weinacker Bros Inc, 1550 Government St, Mobile Ala.
BNO Bert S. Nettles & Samuel M Johnston Esqs Johnston, Johnston & Courtney P O Box 550, Mobile Ala
BNO Retail Clerks Intl Asso AFL-CIO Loc Un 458 Att Clifford E. Taggart No. 1 S Lawrence St Mobile Ala
BNO Otto E Simon Esq Suit 1010 Van Antwerp Bldg Mobile Ala
WWAL 19 NLRB
Washington DC 5-22-64 1502R

Re: Weinacker Brothers, Inc. 15-RC-2850. It is hereby ordered that the employers request for review of the Regional Directors Supplemental Decision and Certification of Representative be, and it hereby is, denied as it raises no substantial issues warranting review. By direction of the Board:

Howard W. Kleeb Assoc Exec Secy
15-RC-2850
GEP 1510R

CONFIRMATION COPY

This is a confirmation copy of a message telephoned to MR on 5-22 at 307 M, General Services Administration, Transportation & Communications Service, Ext. 6644 or 527-6644. Message telephoned by Operator 3.

RESPONDENTS EXHIBIT NO. 8

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTEENTH REGION

WEINACKER BROTHERS, INC.		
and		
LORENZO MATTHEWS, an Individual,	Case No.	15-CA-2486-1
HARRY W. WRIGHT, an Individual,	Case No.	15-CA-2486-2
LOCAL 458, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,	Cases Nos.	15-CA-2486-3 15-CA-2486-4 15-CA-2486-5 15-CA-2486-6 15-CA-2486-8 15-CA-2486-12
ELIZ. BETH ANN BOYETTE, an individual	Case No.	15-CA-2486-15
DONALD HARRIS, an individual	Case No.	15-CA-2486-17
JACK WILLIS SMITH, an individual,	Case No.	15-CA-2486-18
and		
LOCAL 458, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO	Case No.	15-CA-2501

ORDER CONSOLIDATING CASES, COMPLAINT, AND NOTICE OF HEARING

It having been charged by Lorenzo Matthews, an Individual, in Case No. 15-CA-2486-1; Harry W. Wright, an Individual, in Case No. 15-CA-2486-2; Local 458, Retail Clerks International Association, AFL-CIO (herein called the Union), in Cases Nos. 15-CA-2486-3, 4, 5, 6, 8, 12; Elizabeth Ann Boyette, an Individual, in Case No. 15-CA-2486-15; Donald Harris, an Individual, in Case No. 15-CA-2486-17;

Jack Willis Smith, an Individual, in Case No. 15-CA-2486-18; and by the Union in Case No. 15-CA-2501, that Weinacker Brothers, Inc. (herein called Respondent), has engaged in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), by the undersigned Regional Director for the Fifteenth Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

1.

The charge in Case No. 15-CA-2486-1 was filed by Lorenzo Matthews on May 11, 1964, and served on Respondent on or about May 13, 1964. The charge in Case No. 15-CA-2486-2 was filed by Harry W. Wright on May 11, [57] 1964, and served on Respondent on or about May 13, 1964. The charges in Cases Nos. 15-CA-2486-3, 15-CA-2486-4, 15-CA-2486-5, 15-CA-2486-6, 15-CA-2486-8, and 15-CA-2486-12 were filed by the Union on May 11, 1964, and served on Respondent on or about May 13, 1964. The charge in Case No. 15-CA-2486-15 was filed by Elizabeth Ann Boyette on May 12, 1964, and served on Respondent on or about May 13, 1964. The charge in Case No. 15-CA-2486-17 was filed by Donald Harris on May 26, 1964, and served on Respondent on or about June 18, 1964. The charge in Case No. 15-CA-2486-18 was filed by Jack Willis

Smith on May 27, 1964, and served on Respondent on or about June 18, 1964. The charge in Case No. 15-CA-2501 was filed by the Union on June 4, 1964, and served on Respondent on or about June 10, 1964; an amended charge in Case No. 15-CA-2501 was filed by the Union on July 29, 1964, and served on Respondent on or about July 30, 1964.

2.

Respondent is now, and has been at all times material herein, an Alabama corporation with its principal office and place of business in Mobile, Alabama. Respondent is engaged in the business of retail supermarket operations, with subsidiary gasoline and oil services.

3.

During the past 12-month period, which period is representative of all times material herein, Respondent, in the course and conduct of its business operations as described in paragraph 2, above, sold and distributed products, the gross value of which exceeded $500,000. During the same period, Respondent received goods and materials valued in excess of $50,000, which goods and materials were shipped directly to it in the State of Alabama from points outside the State of Alabama.

4.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

The following-named individuals are now, and at all times material herein have been, supervisors of Respondent within the meaning of Section 2(11) of the Act: [58]

Mrs. Jean Brooks	Colen Taylor
Mrs. Myrtis Chaillot	Bob Tew
Cecil Laws	Claude Tingle
Mrs. Mary Richardson	Horace Weaver
Robert M. Weinacker, Jr.	

7.

Respondent, by its supervisor and agent, Mrs. Jean Brooks, at its Mobile, Alabama, store, on or about the dates indicated, engaged in the following acts and conduct:

(a) During the month of January 1964, interrogated employees about their union activities, desires, and feelings;

(b) During the month of January 1964, stated that Respondent would close the store, before it would allow Respondent's employees to be represented by a union;

(c) During the month of January 1964, told employees that anyone who has anything to do with the Union would be fired.

8.

Respondent, by its supervisor and agent Mrs. Myrtis Chaillot, at its Mobile, Alabama, store, on or about the dates indicated, engaged in the following acts and conduct:

(a) During early March 1964, kept under surveillance the meeting place, meetings and activities of the Union;

(b) During the months of December 1963 and January, February, and March, 1964, interrogated employees concerning their union membership, activities, and desires;

(c) On or about January 22, 1964, and March 9, 1964, threatened employees with loss of their jobs if they voted for the Union;

(d) During the latter part of the month of December 1963 or early January 1964, threatened that it would close the store rather than have a union;

(e) On or about February 10, 1964, created an impression of surveillance of union activities by informing an employee that Respondent would spy upon the next union meeting.

9.

Respondent, by its supervisor and agent Cecil Laws, at its Mobile, Alabama, store, during the month of January 1964, told an employee that Respondent would not hire any new employees unless they were against [59] the Union.

10.

Respondent, by its supervisor and agent Mrs. Mary Richardson, at its Mobile, Alabama, store, on or about the dates indicated, engaged in the following acts and conduct:

(a) During early March, 1964, kept under surveillance the meeting place, meetings and activities of the Union;

(b) During the months of February and March 1964, interrogated employees concerning their union membership, activities, and desires;

(c) During the months of January and March 1964, and on or about April 9, 1964, threatened employees with discharge because of their union activities;

(d) During the early part of February 1964, told employee that Respondent would fire anyone who signed a union card.

11.

Respondent, by its supervisor and agent Bob Tew, at its Mobile, Alabama, store, on or about the dates indicated, engaged in the following acts and conduct:

(a) During the months of January, February, and March, 1964, threatened that Respondent would close, before it would allow its employees to be represented by a union;

(b) During the months of January, February, and March, 1964, interrogated employees concerning their union membership, activities, and desires;

(c) During the months of February and early March 1964, threatened that Respondent would discharge employees because of their activities on behalf of the Union.

12.

Respondent, by its supervisor and agent Colen Taylor, at its Mobile, Alabama, store, on or about March 25, 1964, interrogated an employee concerning his union membership, activities and desires.

13.

Respondent, by its supervisor and agent Claude Tingle, at its Mobile, Alabama, store, on or about the dates indicated, engaged in the following acts and conduct:

[60] (a) On or about April 20, 1964, threatened that Respondent would close the service station, before it would allow the service station employees to be represented by the Union;

(b) On or about April 20, 1964, threatened that Respondent would discharge employees suspected of voting for the Union.

14.

Respondent, by its supervisor and agent Horace Weaver, at its Mobile, Alabama, store, on or about the dates indicated, engaged in the following acts and conduct:

(a) During the months of December 1963 and January, February, and March, 1964, interrogated employees concerning their union membership, activities, and desires;

(b) Early in the month of March 1964, kept under surveillance the meeting places, meetings, and activities of the Union;

(c) During the month of January 1964, solicited employees to withdraw their union cards;

(d) During the month of January 1964, and or about March 6, 1964, threatened to discharge employees for union activities;

(e) On or about February 4, 1964, promised an employee benefits for information concerning union leaders;

(f) On or about March 6, 1964, promised an employee benefits after the union matter was straightened out;

(g) On or about March 6, 1964, threatened to close the store, before it would allow its employees to be represented by a union;

(h) During the month of February 1964, prohibited the wearing of union buttons by employees;

(i) During the month of January 1964, promulgated and enforced a rule against union solicitation within the store.

15.

Respondent, by its President and agent, Robert M. Weinacker, Jr., at its Mobile, Alabama, store, on or about the dates indicated, engaged in the following acts and conduct:

[61] (A) On or about January 16, 1964, interrogated employees concerning their union membership, activities, and desires;

(b) Around late February or early March 1964, in a speech to employees, threatened that Respondent would close if the Union was selected as the employees' bargaining representative.

16.

On or about the dates set forth opposite their respective names, Respondent discharged the following-named employees and thereafter failed and refused, and continues to fail and refuse, to reinstate them:

Elizabeth Ann Boyette	May 1, 1964
Sadie B. Burgess	February 4, 1964
Burl Dock	February 15, 1964
Cleveland Dortch	April 24, 1964
Marguerite Etheredge	January 13, 1964
Lorenzo Matthews	May 2, 1964
Mildred E. Turner	February 10, 1964
W. J. Williams	April 18, 1964
Harry W. Wright	February 28, 1964

17.

On or about the dates set forth opposite their respective names, and thereafter, provided the following-named employees with less employment than they normally would have received:

Sadie Burgess	January 20, 1964
Donald Harris	March 20, 1964
Jack Smith	April 20, 1964
Elizabeth Ann Boyette	March 16, 1964

18.

Around the end of February and beginning of March 1964, Respondent denied W. J. Williams and Lorenzo Matthews the use of dining and rest room facilities.

19.

Respondent engaged in the acts and conduct with respect to those employees named in paragraphs 16 through 18, above, as described in paragraphs 16 through 18, above, because of their membership in and activities on behalf of the Union, and to discourage union and other concerted activities of its employees.

[62] All full-time and regular part-time employees at Respondent's Mobile, Alabama, retail operation, including office clerical employees and the grocery, produce, meat, drug, warehouse and service station departments, excluding employees in the snack bar, professional employees, watchmen and/or guards and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

21.

On or about March 9, 1964, in Case No. 15-RC-2850, a majority of Respondent's employees in the appropriate unit described in paragraph 20, above, by a secret ballot election conducted under the supervision of the Regional Director of the Board's Fifteenth Region, designated and

selected the Union as their representative for the purpose of collective bargaining with the Respondent, and on or about April 16, 1964, the Regional Director of the Board's Fifteenth Region certified the Union as the exclusive collective-bargaining representative of the employees in said unit.

22.

At all times since on or about March 9, 1964, the Union has been, and now is, representative for the purpose of collective bargaining of a majority of the employees in the unit described in paragraph 20, above, and, by virtue of Section 9(a) of the Act, has been, and now is, the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

23.

Commencing on or about April 20, 1964, and at various times thereafter to date, the Union requested, and has continued to request, Respondent to bargain collectively with it as the exclusive bargaining representative of all employees of Respondent in the unit described in paragraph 20, above, with respect to rates to pay, wages, hours of employment and other terms and conditions of employment.

24.

Commencing on or about April 20, 1964, and at various times thereafter, Respondent refused, and continues to refuse, to bargain [63] collectively with the Union as the exclusive bargaining representative of all employees in the unit described above in paragraph 20, in that Respondent failed and refused to meet at reasonable times and confer in good faith with the Union with respect to wages, hours and other terms and conditions of employment, in spite of the Union's repeated requests that it do so.

25.

Commencing on or about April 20, 1964, and at all times thereafter, Respondent did further refuse, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the unit described above in paragraph 20, in that Respondent failed and refused to furnish information requested by the Union, concerning the existing wages, job classifications, and related information concerning employees in the bargaining unit, which was necessary, relevant, and material to the Union's intelligent bargaining on such matters.

26.

By the acts described in paragraphs 7 through 15, above, and by each of said acts, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act.

27.

By the acts described in paragraphs 16 through 19, agove, and by each of said acts, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and (3) and Section 2(6) and (7) of the Act.

28.

By the acts described in paragraphs 24 and 25, above, and by each of said acts, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and (5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 12th day of October 1964 at 10 o'clock in the forenoon (CST), at Room 301, Grand Jury Room, United States Courthouse and Customhouse, Mobile, Alabama, [64] a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the

above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at New Orleans, Louisiana, this 31st day of August 1964.

John F. LeBus, Regional Director
National Labor Relations Board
Fifteenth Region
T6024 Federal Building (Loyola)
701 S Loyola Avenue
New Orleans, Louisiana 70113

RESPONDENTS EXHIBIT No. 8A

[Weinacker Brothers Inc. and Lorenzo Matthews et al., Consolidated Cases Nos. 15-CA-2486-1 et al. before the NLRB]

AMENDMENTS TO COMPLAINT

Pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the Complaint heretofore [65] issued and incorporated in the Order Consolidating Cases, Complaint and Notice of Hearing dated August 31, 1964, in the above entitled proceeding is hereby amended by amending the wording of paragraphs 17 and 28 (amendments in said paragraphs underlined), and by adding paragraph 25 (a) as follows:

17.

On or about the dates set forth opposite their respective names, and thereafter, Respondent provided the following-

named employees with less employment than they normally would have received:

Sadie Burgess	January 20, 1964
Donald Harris	March 20, 1964
Jack Smith	April 20 *and May 4*, 1964
Elizabeth Ann Boyette	March 16, 1964

25(a).

On or about April 20, 1964, and May 4, 1964, and at various times thereafter, Respondent refused, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative of all employees in the unit described above in paragraph 20, in that Respondent unilaterally changed existing wage rates, hours of employment, and other terms and conditions of employment of employees in the unit described above in paragraph 20.

28.

By the acts described in paragraphs 24, 25 and 25(a), above, and by each of said acts, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and (5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE THAT, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the Regional Director of the Fifteenth Region, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to paragraphs 17, 25(a) and 28 of the Amendments to the Complaint within ten days from the service hereof, and that unless it does so, all paragraphs with respect to said amendments to Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at New Orleans, Louisiana, this 16th day of September, 1964.

Fred A. Lewis
Acting Regional Director
[66] National Labor Relations Board
Fifteenth Region
T6024 Federal Building (Loyola)
701 Loyola Avenue
New Orleans, Louisiana 70113

RESPONDENTS EXHIBIT NO. 8B

(Weinacker Brothers Inc. and Lorenzo Matthews et al, Consolidated Cases Nos. 15-CA-2486-1 et al. before the NLRB)

AMENDMENTS TO COMPLAINT

Pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the Complaint heretofore issued and incorporated in the Order Consolidating Cases, Complaint and Notice of Hearing dated August 31, 1964, in the above-entitled proceeding, and amended under date of September 16, 1964, is hereby further amended by amending the wording of paragraphs 6 and 7 (amendments in said paragraphs underlined), and by adding paragraphs 8 (A) and 15 (c), as follows:

6

The following-named individuals are now, and at all times material herein have been, supervisors of Respondent within the meaning of Section 2(11) of the Act:

Mrs. Jean Brooks	Robert M. Weinacker, Jr.
Mrs. Myrtis Chaillot	Colen Taylor
William Chavers	Bob Lew
Cecil Laws	Claude Tingle
Mrs. Mary Richardson	Horace Weaver

7.

Respondent, by its supervisor and agent Mrs. Jean Brooks, at its Mobile, Alabama, store *and in the home of an employee*, on or about the dates indicated, engaged in the following acts and conduct:

(a) During the month of January 1964, interrogated employees about their union activities, desires, and feelings;

(b) During the month of January 1964, stated that Respondent would close the store, before it would allow Respondent's employees to be represented by a union;

(c) During the month of January 1964, told employees that anyone who has anything to do with the Union would be fired.

8(A)

Respondent, by its supervisor and agent William Chavers, at its Mobile, Alabama, store, on or about September 17, 1964, interrogated an employee concerning whether or not he had been subpenaed to appear at a hearing and threatened to fire the employee if he complied with the subpena.

15.

(c) During the month of January or February, interrogated employees concerning their union activities.

PLEASE TAKE NOTICE that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the Regional Director of the Fifteenth Region, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to paragraphs 6, 7, 8(A) and 15(c) of the Amendments to Complaint within 10 days from the service hereof, and that unless it does so, all paragraphs with respect to said Amendments to Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at New Orleans, Louisiana this 30th day of September 1964.

John F. LeBus, Regional Director
National Labor Relations Board
Fifteenth Region

T6024 Federal Building (Loyola)
701 Loyola Avenue
New Orleans, Louisiana 70113

RESPONDENT'S EXHIBIT NO. 9

[Weinacker Brothers, Inc. and Lorenzo Matthews, et al., Consolidated Cases Nos. 15-CA-2486-1, et al.]

[68] ANSWER

Comes now Weinacker Brothers, Inc. respondent herein, through undersigned counsel, and reserving all its rights, makes the following Answer to the Complaint

1

Respondent admits the allegations contained in paragraph 1 of the Complaint

2

Respondent admits the allegations contained in paragraph 2 of the Complaint

3

Respondent admits the allegations contained in paragraph 3 of the Complaint

4

Respondent denies the allegations contained in paragraph 4 of the Complaint

5

Respondent admits the allegations contained in paragraph 5 of the Complaint

6.

Respondent denies the allegations contained in paragraph 6 of the Complaint except that it admits that Mrs. Jean Brooks, Mrs. Myrtis [69] Chaillot, Cecil (illegible), Robert M. Weimacker, Jr., Colen Taylor, Claude Tingle and Horace Weaver are supervisors within the meaning of Section 2(11) of the Act.

7.

Respondent denies the allegations contained in paragraph 7 of the Complaint.

8.

Respondent denies the allegations contained in paragraph 8 of the Complaint.

9.

Respondent denies the allegations contained in paragraph 9 of the Complaint.

10.

Respondent denies the allegations contained in paragraph 10 of the Complaint.

11.

Respondent denies the allegations contained in paragraph 11 of the Complaint.

12.

Respondent denies the allegations contained in paragraph 12 of the Complaint.

13.

Respondent denies the allegations contained in paragraph 13 of the Complaint.

14.

Respondent denies the allegations contained in paragraph 14 of the Complaint.

15.

Respondent denies the allegations contained in paragraph 15 of the Complaint.

16.

Respondent denies the allegations contained in paragraph 16 of the Complaint.

17.

Respondent denies the allegations contained in paragraph 17 of the Complaint.

18.

Respondent denies the allegations contained in paragraph 18 [70] of the Complaint.

19.

Respondent denies the allegations contained in paragraph 19 of the Complaint.

20.

Respondent denies the allegations contained in paragraph 20 of the Complaint.

21.

Respondent denies the allegations contained in paragraph 21 of the Complaint.

22.

Respondent denies the allegations contained in paragraph 22 of the Complaint.

23.

Respondent denies the allegations contained in paragraph 23 of the Complaint.

24.

Respondent denies the allegations contained in paragraph 24 of the Complaint.

25.

Respondent denies the allegations contained in paragraph 25 of the Complaint.

26.

Respondent denies the allegations contained in paragraph 26 of the Complaint.

27.

Respondent denies the allegations contained in paragraph 27 of the Complaint.

28.

Respondent denies the allegations contained in paragraph 28 of the Complaint.

WHEREFORE, the premises considered, respondent prays that after due proceedings had the Complaint be dismissed in its entirety.

Respectfully submitted this day of September, 1964

s/ Bert S. Nettles
Johnston, Johnston & Nettles,
First National Bank Annex
Mobile, Alabama.

s/ Richard C. Keenan
Kullman & Lang
1010 Whitney Building
New Orleans, Louisiana
Counsel for Weinacker Brothers, Inc.

[Certificate of Service Omitted in Printing]

RESPONDENT'S EXHIBIT NO. 2B

[Weinacker Brothers, Inc. and Lorenzo Matthews, et al., Consolidated Cases Nos. 15-CA-2486-1, et al., before the National Labor Relations Board, Fifteenth Region]

[72] AMENDMENTS TO ANSWER

Comes now Weinacker Brothers, Inc., respondent herein, through undersigned counsel and reserving all its rights,

makes the following Answer to the Amendments to Complaint, dated September 16, 1964:

17.

Respondent denies the allegations contained in the amended paragraph 17 of the complaint.

25(a).

Respondent denies the allegations contained in the amended paragraph 25(a) of the complaint.

28.

Respondent denies the allegations contained in the amended paragraph 28 of the complaint.

s/Bert S. Nettles
Johnston, Johnston & Nettles
Mobile, Alabama
s/ Richard C. Keenan
Kullman & Lang
New Orleans, Louisiana

Counsel for Weinacker Brothers, Inc. and Robert M. Weinacker, Jr.

[Certificate of Service Omitted in Printing]

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[73] ORDER SETTING PLEA TO TEST SUFFICIENCY OF PLEA TO JURISDICTION

In the above styled cause, the matter of the plea to jurisdiction as filed by the Respondents herein being brought to the Court's attention and at the request of the solicitor for the Respondents; it is ORDERED that the plea to jurisdiction be and the same is hereby set for hearing this day, January 25, 1965, at 2:30 p.m.

Dated January 25, 1965.

s/ Dan T. McCall, Jr.
Judge

ORDER OVERRULING PLEAS TO JURISDICTION

This cause having regularly been set down for hearing to test the sufficiency of the plea to jurisdiction as filed by the Respondents herein, and the Court hearing the arguments of the respective solicitors hereto and duly considering same, the Court is of the opinion that said plea to jurisdiction should be overruled.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the plea to jurisdiction as filed by the Respondents in the above styled cause be and the same hereby is overruled.

Dated, January 25, 1965.

s/ Dan T. McCall, Jr.
Judge

ANSWER TO THE AMENDED PETITION AND MOTION TO DISSOLVE AND DISMISS

Now come the Respondents, without waiving the plea to the jurisdiction of the court heretofore filed, but specifically reserving the same in excepting to the ruling of the court on January 25, 1965 and file this their answer to the amended bill of complaint and shows as follows:

ONE

The allegations of Paragraph One are admitted.

TWO

The allegations of Paragraph Two are admitted.

THREE

Respondents have no personal knowledge of the truth of Paragraph Three and request strict proof thereof.

FOUR

The Respondents admit they are members of Respondent Retail Clerks Union, Local No. 455, in Mobile, and are em-

gaged in lawful picketing the shopping center at Government and Catherine Streets located in Mobile, Alabama. The Respondents deny that they jointly and severally and as members of the named Union trespassed illegally on the property of the complainant.

FIVE

Respondents deny that they have continuously unlawfully trespassed and have deprived the complainant of the peaceful possession and enjoyment of its property and premises and that it has interfered with the complainant's right of peaceful possession of its property and that they have interfered with the complainant in the conduct of its business and the operation of the above described shopping center. Respondents further deny that the complainant has been damaged in that it has lost the peaceful use of its property and the right of operating its business without the interference from any lawful trespassing on its premises.

In further answer, Respondents show that the labor dispute involved affects interstate commerce and the National Labor Relations Board has exclusive jurisdiction over the allegations of complainant's petition, as amended, and if the same be illegal under Federal law, then this Honorable Court has no jurisdiction to grant redress or an injunction or any other relief prayed for in the original petition, as amended. If the conduct of the Respondents complained of by the complainant is not illegal under Federal law, then it is protected under the National Labor Relations Act, as amended, and in that event this court does not have jurisdiction to grant redress or an injunction or any other relief prayed for in the amended bill of complaint.

SIX

Respondents admit they have legally picketed back and forth in front of the door of the shopping center but they have no personal knowledge that the area is owned by the complainant.

SEVEN

Respondents admit that they are lawfully picketing the complainant's [75] business in accordance with Federal Law. Respondents deny that their picketing has become more intense since the court entertained the complainant's petition. Respondents deny that they are causing irreparable injury to the complainant and are obstructing customers from leaving or entering complainant's place of business. Respondents further deny that their acts are outside the realm of peaceful picketing and contend that their acts are legal under the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States.

EIGHT

Respondents deny that it is necessary for this Honorable Court to grant injunctive relief and further state that this Honorable Court has no jurisdiction to grant redress or an injunction or any other relief prayed for in the amended bill of complaint.

In further answer, the Respondents show that all their activities have been legal under the Federal Law, Alabama Law and to enjoin the same would infringe upon the rights of the Respondents herein and all the members of the Retail Clerks International Association, the laws of the United States and the First and Fourteenth Amendments to the Constitution of the United States. Respondents further move that the exhibits presented to the court in the previous plea to the jurisdiction of the court be incorporated and made a part hereof to this answer and motion.

WHEREFORE, Respondents move that this answer be considered and sustained and that complainant's amended bill and original bill for and injunction be dismissed and the temporary restraining order heretofore issued on the amended bill of complaint be *dissolved* [in ink] and damages and costs of court be taxed against the complainant.

WHEREFORE, Respondents further pray the court that if they are mistaken in the relief sought or should other relief be appropriate, then they pray for additional relief as they may show themselves entitled to receive, premises considered.

Respectfully submitted,
Simon and Wood
By: s/ Otto E. Simon
Solicitor for Respondents

STATE OF ALABAMA
[76] COUNTY OF MOBILE

Personally appeared before me, the undersigned officer authorized by law to administer oaths, CLIFFORD TAGGART, who, after first being duly sworn, deposes and says that he is Business Manager of the Respondent Local 458, Retail Clerks International Association, AFL-CIO; and in his capacity as an individual Respondent, has knowledge of the facts recited in the above and foregoing Answer and the same are true; and those facts alleged on information and belief he verily believes to be true.

s/ Clifford Taggart

Sworn to and subscribed before me this 1st day of February, 1965.

s/ Helen Knapp
Notary Public, State of Ala.-at-large

STATE OF ALABAMA)
COUNTY OF MOBILE)

Personally appeared before me, the undersigned officer authorized by law to administer oaths, RILEY E. HOBBS, who, after first being duly sworn, deposes and says that he is a member of the Respondent Local 458, Retail Clerks International Association, AFL-CIO; and in his capacity as an individual Respondent, has knowledge of the facts recited in the above and foregoing Answer and the same are true; and those facts alleged on information and belief he verily believes to be true.

s/ Riley E. Hobbs

Sworn to and subscribed before me this 1st day of February, 1965.

s/ Helen Knapp
Notary Public, State of Ala.-at-large

[Certificate of Service Omitted in Printing]

Filed February 1st, 1965
s/ W. Elsworth Haughton, Register

[76A] Respondents' Exhibits 1-9 inclusive, heretofore attached to the Plea to Jurisdiction of the Respondents', set out in this transcript on pages 23-72, inclusive, are incorporated and made a part of the Answer to the Amended Petition and Motion to Dissolve and Dismiss, are not recopied at this point.

[77] ORDER SETTING HEARING

By order of the undersigned, it is ORDERED that the hearing of the motion to dissolve as filed by the Respondents be and the same hereby is set for hearing on February 15, 1965 at 2:00 P.M.

Dated February 12, 1965

s/ Dan T. McCall, Jr.
Judge

ORDER RESETTING HEARING

By order of the undersigned, it is ORDERED that the hearing of the motion to dissolve as filed by the Respondents be and the same hereby is reset for hearing on February 26, 1965 at 2:00 P.M.

Dated, February 15, 1965.

s/ Dan T. McCall, Jr.
Judge

ORDER CONTINUING HEARING ON MOTION TO DISSOLVE AND DISMISS

By consent of the solicitors of record in the above styled cause it is ORDERED by the Court that the hearing on the motion to dissolve and dismiss set for hearing on Tuesday, February 28, 1965 be and the same hereby is continued to Friday, March 5, 1965 at 2:30 P.M.

Dated February 25, 1965.

Daniel McCall, Jr.
Judge

ORDER CONTINUING HEARING ON MOTION

At the request of the solicitors of record it is ORDERED by the Court that the hearing on the motion to dissolve and dismiss as filed in said cause be and hereby is continued to March 9, 1965 at 2:30 P.M.

Dated March 5, 1965.

Daniel McCall, Jr.
Judge

ORDER OF SUBMISSION ON MOTION TO DISSOLVE AND DISMISS

This cause coming on to be heard on this day is submitted for decree upon the motion to dissolve and dismiss as filed by the Respondents in the above styled cause.

Dated March 9, 1965.

Opinion and Judgment of the Circuit Court of Mobile County, Alabama, in Equity

The Court has read the briefs submitted by counsel for the respective parties and the reported decisions contained therein and having fully understood and considered the matter, the Court is of the opinion and recognizes that where the activity is arguably subject to Section 7 and 8 of the National Labor Relations Act, the State Court is divested of jurisdiction and must yield to the primary jurisdiction of the National Labor Relations Board, and, generally, the "Pre-emption Doctrine" to bar actions by State Court, under State law is applied where peaceful picketing is carried on on a public street on a privately owned street or parking area which has lost its identity as such and partakes "of the nature of a city street".

But where a storeowner invites prospective customers to come to his store to trade and to park on his grounds, making available the latter while doing business with the storeowner, the invitation is for one particular purpose, not for any purpose to the general public, and the use of the storeowner's parking lot and sidewalks is of a purely private character over which the State Courts retain jurisdiction to issue, upon seeking injunctive relief to bar trespassing. Hood v. Stafford, 315 SW 2nd, 706.

The Court is of the further opinion that under the facts of the case at bar submitted by the Respondent, to trespass on the Complainant's premises by picketing, after being requested to leave. Freedom of speech guaranteed to the Respondents in the First and Fourteenth Amendments to the Federal Constitution, did not give them the right to remain on the parking area and sidewalks of the Complainant after they were ordered to leave.

It is Accordingly Ordered, Adjudged and Decreed by the Court that this Court does have jurisdiction of the subject matter involved in this suit which has not been divested by the National Labor Relations Act.

It Is Further Ordered, And Decreed by the Court that the Respondents, by going on the Complainant's premises for the purpose of picketing the Complainant's merchandising, were trespassers, and were employing an unlawful means of exercising their right to picket and that their activity in this respect is subject to injunctive relief by a State Court of Equity.

It Is Further Ordered, And Decreed by the Court that Respondents' Motion to Dissolve the Writ of Temporary Injunction heretofore issued by this Court and to Dismiss the Complainant's Verified Bill and Petition be and the same is hereby denied.

It Is Further Ordered, And Decreed by the Court that the Writ of Temporary Injunction heretofore issued by this Court be and the same is hereby continued until ordered dissolved by this Court or by law.

Ordered, And Decreed at Mobile, Alabama, this 1st day of April, 1963.

[illegible]
Judge.

NOTICE OF APPEAL

Come now Clifford Taggart and Retail Clerks Union Local No. 488 Respondents in the above entitled cause, and hereby gives Notice of Appeal to the Supreme Court of Alabama from an Order of the Circuit Court of Mobile County, Alabama, In Equity rendered the [83] 1st day of April, 1965 denying the Respondents' Motion to Dissolve a Writ of Temporary Injunction and to Dismiss the Complainant's Verified Bill and Petition.

Simon and Wood
By: s/ Otto F. Simon
Solicitor of Record for Respondents

Filed April 9, 1965
s/ W. Elsworth Haughton, Register

[84] IN THE SUPREME COURT OF THE STATE OF ALABAMA

CLIFFORD TAGGART, RILEY HOBBS, JAMES STUCKEY, Individually and as President of Retail Clerks Union Local 488 of Mobile, and RETAIL CLERKS' UNION LOCAL 488 OF MOBILE,

Appellants,

vs.

WEINACKER'S INC., a Corporation,

Appellee.

Appeal from the Circuit Court of Mobile County, Alabama, In Equity.

ASSIGNMENT OF ERRORS

Comes the Appellants, Clifford Taggart and Retail Clerks Union Local 488 of Mobile, in the above entitled cause and show unto the Court that there is manifest error in the following [85] particulars in the proceedings of the Circuit Court

of Mobile County, Alabama, in Equity sitting, to the great damage and prejudice of these Appellants, and as grounds of error Appellants assign the following separately and severally:

1. The trial court erred in issuing a Writ of Injunction on January 22, 1965. (Transcript pg. 141)

2. The trial court erred in its order of January 28, 1965, overruling the Respondents' pleas to the jurisdiction. (Transcript pg. 733)

3. The trial court erred in its order of April 1, 1965 wherein the Court decreed it had jurisdiction over the subject matter of the suit. (Transcript pg. 821)

4. The trial court erred in its order of April 1, 1965 wherein the court decreed that jurisdiction had not been divested by the National Labor Relations Act, as amended. (Transcript pg. 821)

[89] 5. The trial court erred in its order of April 1, 1965 wherein the court decreed the Respondents were employing an unlawful means of exercising their right to picket. (Transcript pg. 821)

6. The trial court erred in its order of April 1, 1965 wherein the court decreed that the Respondents' picketing activities were subject to injunctive relief by a State Court of Equity. (Transcript pg. 821)

7. The trial court's ruling of April 1, 1965 that the court had jurisdiction of the subject matter involved in the suit was contrary to the law of the case. (Transcript pg. 821)

8. The trial court erred in its order of April 1, 1965 denying the Respondents' Motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants Verified Bill and Petition. (Transcript pg. 821)

9. The trial court erred in its order of April 1, 1965 continuing the Writ of Temporary Injunction. (Transcript pg. 821)

10. The order of the trial court on April 1, 1965 holding that the primary jurisdiction of the subject matter in dispute had not been pre-empted by the National Labor Relations Board and denying the Respondents' motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants' Sic Verified Bill and Petition was contrary to the law in this cause. (Transcript pg. 82)

Dated at Mobile, Alabama, this 2nd day of June, 1965.

SIMON AND WOOD

By Otto I. Simon
Attorney For Appellants
1010 Van Antwerp Building
Mobile, Alabama

[Certificate of service omitted]

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[92] MOTION TO AFFIRM FOR FAILURE OF APPELLANTS TO PRESENT ANYTHING FOR REVIEW

Now comes Appellee in the above styled cause and respectfully moves this Court to affirm the decision of the lower court in the above styled cause and as grounds therefor represents and shows unto the court as follows:

1. Appellants in their brief group together for argument their Assignments of Error number 1, 3, 4, and 10. (Appellants' brief pp. 5-15). Appellants' Assignment of Error number 2 deals with the ruling of the trial court overruling respondents' plea to the jurisdiction in its order of January 28, 1965. Appellants' Assignments of Error number 5, 6, 7, 8, and 9 are unrelated to Assignment of Error number 1 and attempt to assign as error various aspects of the court's order of April 1, 1965 denying respondents' motion to dissolve the temporary injunction and dismiss the bill. Assignment of Error number 2 is not sufficiently specific under Supreme Court Rule Number One in that it fails to specify concisely in what the error consists and hence such assign-

ment is without merit. Assignment of Error number 7 presents nothing for review and hence is without merit, hence all errors if any in these assignments of error have been waived, or present nothing for review.

2. Appellants in their brief group together for argument the remainder of their Assignments of Error numbered 1, 5, 6, 8, and 9 (Appellants' Brief, pp. 14-18). Assignment of Error number 1 that

> "The trial court erred in issuing a Writ of Injunction on January 22, 1965." (Transcript pg. 14)

is not sufficiently specific under Supreme Court Rule Number One and [93] attempts to assign as error a non-appealable interlocutory order of the court and the issuance of said preliminary ex parte injunction was proper, hence said assignment is without merit. The remaining Assignments of Error numbered 5, 6, 8, and 9, argued together with Assignment of Error number 1, are unrelated to Assignment of Error number 1 and attempt to assign as error various aspects of the trial court's order of April 1, 1965, denying the Respondents' Motion to Dissolve the Temporary Injunction and to dismiss the Plaintiff's verified bill of complaint; hence all of said assignments either present nothing for review or are without merit or are waived.

Wherefore, Appellants have presented nothing for this court to review and the judgment is due to be affirmed.

M. A. Marsal and
Howell, Johnston & Langford
as Attorneys for Appellee
By: Jerry L. Langford

[Certificate of service omitted]

In the Supreme Court of Alabama — Wednesday, November 10, 1965

[Caption omitted]

Upon the parties by attorneys and argue and submit this cause on motion and mature consideration

Opinion of the Supreme Court of Alabama

Filed September 19, 1968

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL SESSION, 1968.

1 Div. 295

CLIFFORD TAGGART, ET AL.

v.

WEINACKER'S, INC., A CORP.

Appeal from Mobile Circuit Court, In Equity

COLEMAN, JUSTICE.

Respondents appeal from a decree denying their motion to dissolve a temporary injunction.

Complainant filed a verified bill of complaint averring that it possessed and operated a shopping center at the intersection of Government and Catherine streets in Mobile, and that the continuing trespass by respondents on complainant's lot deprived it of peaceful possession and caused it irreparable injury.

On a petition, treated as an amendment to the bill, the court granted a temporary injunction restraining the trespass.

Respondents filed a plea to the jurisdiction asserting that state court jurisdiction of the subject matter had been pre-empted by the National Labor Relations Act and that the National Labor Relations Board had taken jurisdiction of the dispute between these parties in proceedings filed by respondents with the Board, and that the Board

had taken jurisdiction and had certified the respondent union as bargaining representative of the employees of complainant on April 16, 1964, prior to filing of complainant's bill on January 21, 1965. It appears that proceedings were had before the Board, which did not include the subject matter of the instant suit. The court overruled the plea.

Respondents then filed an answer and motion to dissolve the temporary injunction, in which respondents expressly reserved exception to the ruling on the plea, and again raised objection to the court's jurisdiction, and prayed for dissolution of the injunction.

The cause was heard and was submitted at conclusion of the hearing on certified bill, petition, affidavits, answer, and motion to dissolve.

The court again decided that it had jurisdiction and denied the motion to dissolve. Respondents appealed.

Motion to Affirm

Respondents have made ten assignments of error and argue them in two groups. Respondents argue assignment 2, 3, 4, 7, and 10 in bulk in one group, and assignments 1, 5, 6, 8, and 9 in bulk in another group.

Complainant says that none of the assignments in each group are bad and not sufficient to invite review, are not related to other assignments argued in bulk in the same groups, and therefore, the other assignments in the two groups ought not to be considered and the decree appealed from should be affirmed.

It is true that where unrelated assignments are argued together, and one is without merit, the others will not be considered. *National Association For The Advancement of Colored People v. State*, 274 Ala. 544, 150 So. 2d 677 (see cited in Ala. Digest, Appeal & Error, Key No. 730).

but this rule applies only when the assignments are not kindred or related. *Southern Electric Generating Company* v. *Lance*, 269 Ala. 25, 33, 110 So. 2d 627. Where the assignments of error are so related that they may be treated as being predicated upon a single argument, the fact that they are argued in bulk is not objectionable. *Hartford Fire Ins. Co.* v. *Clark*, 258 Ala. 141, 152, 61 So. 2d 19; *Southern Electric Generating Company* v. *Lance*, supra; *Socier* v. *Woodard*, 264 Ala. 514, 518, 88 So. 2d 783; *Bryan* v. *W. T. Smith Lumber Co.*, 278 Ala. 538, 542, 179 So. 2d 287. In a case where three assignments were argued together and were related or kindred, this court did consider them separately. *Gilliland & Echols Farm Supply & Hatchery* v. *Credit Equipment Corp.*, 269 Ala. 190, 195, 112 So. 2d 331.

Where several assignments are governed by the same legal principles and argument, it is not objectionable to argue them in bulk in the brief. *Hartford Fire Ins. Co.* v. *Clark*, supra; *Socier v. Woodard, supra; Bryan* v. *W. T. Smith Lumber Co.*, supra.

In the first group, assignments 2, 3, 4, 7, and 10 are argued together. They recite:

> "2. The trial court erred in its order of January 25, 1965 overruling the Respondents' plea to the jurisdiction. (Transcript pg. 73).
>
> "3. The trial court erred in its order of April 1, 1965 wherein the court decreed it had jurisdiction over the subject matter of the suit. (Transcript pg. 82).
>
> "4. The trial court erred in its order of April 1, 1965 wherein the court decreed that jurisdiction had not been divested by the National Labor Relations Act, as amended. (Transcript pg. 82).
>
> ". . . . . .

"7. The trial court's ruling of April 1, 1965 that the court had jurisdiction of the subject matter involved in the suit was contrary to the law of this cause. (Transcript pg. 82).

". . . . . .

"10. The order of the trial court on April 1, 1965 holding that the primary jurisdiction of the subject matter in dispute had not been pre-empted by the National Labor Relations Board and denying the Respondents' Motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants' (sic) Verified Bill and Petition was contrary to the law in this cause. (Transcript pg. 82)."

Complainant argues that assignment 2 is bad because it fails to show how or in what way the court erred. We are not inclined to agree with this argument. The assignment says the court erred in overruling respondents' plea to the jurisdiction. This shows how the court erred.

Complainant says assignment 7 and 10 are bad and complainant is probably correct. These assignments do not assert that the court erred and merely say that the ruling was contrary to law. *National Association For The Advancement of Colored People v. State*, supra, and *Andrews v. May*, 277 Ala. 248, 249, [1], 168 So. 2d 619.

Even if assignments 2, 7, and 10 are bad, however, all the assignments in this group are related because they are governed by the same legal principles and argument, to wit, that the trial court had been divested of jurisdiction because the National Labor Relations Act had pre-empted jurisdiction of the subject matter of the suit. Assignments 3 and 4 appear to be good assignments and we will consider them, although other related assignments argued in the group are bad. *Gilliland & Echols Farm Supply & Hatchery v. Credit Equipment Corp.*, supra.

In the second group of assignments, which are argued together, is assignment 1 which recites:

> "1. The trial court erred in issuing a Writ of Injunction on January 22, 1965. (Transcript pg. 14)."

The order of January 22, 1963, was made without the hearing provided for by § 1054, Title 7, Code 1940. No appeal lies from the order granting the injunction unless the order is shown by the record to have been made, or purports to have been made, after a hearing as provided by § 1054, Title 7, Code 1940 (§ 8304, Code 1923). *Berman* v. *Wreck-A-Pair Building Co.*, 234 Ala. 293, 297, 175 So. 269. The order of January 22, 1965, granting the injunction will not support an appeal.

In an appeal involving a similar order granting a temporary injunction without a hearing as provided by § 1054, Title 7, this court said:

> "In our opinion, the assignments of error which challenge the decree of March 19, 1960, in so far as it orders the issuance of a temporary injunction present nothing for our review, for an appeal does not lie from an order or decree granting a temporary injunction unless the record shows that the order or decree was made or purported to be made after a hearing as provided by § 1054, Title 7, Code 1940. (Citations Omitted)
>
> "The appellant's remedy in regard to the temporary injunction was by way of motion to dissolve under the provisions of § 1052, Title 7, Code 1940, and if the ruling was adverse to appeal therefrom as provided by § 757, Title 7, Code 1940." *Brooks* v. *Everett*, 271 Ala. 380, 384, 124 So. 2d 100.

See also: *WGOK, Inc.* v. *WMOZ, Inc.*, 275 Ala. 264, 265, 154 So. 2d 22.

Complainant says that assignment 1 presents nothing for review. We agree.

Complainant says further that because assignment 1 presents nothing for review and is argued in bulk together with assignments 5, 6, 8, and 9, none of the assignments argued in bulk in this group are to be considered.

We are of opinion that all assignments in the second group are related because they depend upon the same legal principles and argument, to wit, that the First and Fourteenth Amendments to the Constitution of the United States do not permit the state to enjoin respondents from picketing on complainant's property, and, therefore, that the court erred in denying the motion to dissolve. Assignment 8 recites:

> "8. The trial court erred in its order of April 1, 1965 denying the Respondents' Motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants' (sic) Verified Bill and Petition. (Transcript pg. 82)."

Assignment 8 asserts that the court erred and states how the court erred. We think it has not been shown that this is a bad assignment, and we will consider it.

For these reasons, the motion to affirm is overruled.

On the Merits.

Respondents argue that the trial court erred in two particulars, first, in determining that it had jurisdiction of the subject matter of the suit.

In support of this argument, respondents cite a number of decisions which hold that under the Labor Management Relations Act as amended, U.S.C.A., Title 29, § 141, et seq., state courts are excluded from jurisdiction over peaceful picketing and that exclusive jurisdiction has been conferred on the National Labor Relations Board. Re-

spondents say that the concerted activity of picketing is subject to control and regulation by the Board, that the Board has assumed jurisdiction of the dispute between these parties in other particulars, and that complainant's only remedy is by bringing the subject matter of the instant suit to the attention of the Board, which has not expressly declined jurisdiction over the activity here enjoined.

In support of this contention, respondents cite *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 3 L. ed 2d 775, 79 S. Ct. 773, in which the court undertook to state the rule of federal pre-emption as follows:

> ". . . . When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. (Citation Omitted) Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.
>
> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . . .
>
> ". . . . . .

". . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. (Citation Omitted)" (3 L. ed 2d at pages 782 and 783)

The last cited case was the second appeal to the United States Supreme Court in the same lawsuit. In the first appeal, 353 U.S. 26, 1 L. ed 2d 618, 77 S. Ct. 607, 609, the court had vacated the judgment of a state court enjoining peaceful picketing of a retail lumber yard. As we understand the opinion on second appeal in 3 L. ed 2d at page 784, the court held that because the ". . . . National Labor Relations Board has not adjudicated the status of the conduct for which the State . . . . seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced."

In opinion on first appeal in 1 L. ed 2d, the court vacated the injunction on authority of two other cases decided the same day; i. e., *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 1 L. ed 2d 601, 77 S. Ct. 598, 609, and *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, 1 L. ed 2d 613, 77 S. Ct. 604.

In *Guss*, the National Board had declined jurisdiction of charges of unfair labor practices brought by the union against an employer. The National Board declined to act, but did not cede jurisdiction to the state agency as authorized by § 10(a) of the National Act. The union filed the same charges with the Utah Labor Relations Board which found that it had jurisdiction and granted relief. When the case reached the United States Supreme Court, that court held that the proviso to § 10(a) is the exclusive means whereby states may be enabled to act concerning the matters which Congress has entrusted to the National

Board; that the activity complained of was an unfair labor practice under the National Act; that, although the National Board had declined to act, it had not ceded jurisdiction in the only authorized way; and, therefore, the state agency was powerless to act.

In *Fairlawn*, a state court enjoined the union from picketing the premises of an employer who operated three meat markets in separated localities, from trespassing upon the employer's premises, and from exerting secondary pressure on the suppliers of the employer. The United States Supreme Court assumed that ". . . . it was obvious that the Board would decline jurisdiction." 1 L. ed 2d at page 615. The writer of the Summary, at page 601 in 1 L. ed 2d, states that the court vacated the judgment granting the injunction on the ground that even if the National Board would obviously decline jurisdiction, the state court had no power to enjoin the union conduct involved because it was of that kind regulated by the National Board. The concluding paragraph of the court's opinion recites:

> "One final point remains to be considered. At two of respondent's stores, located in suburban shopping centers, the picketing occurred on land owned by or leased to respondent though open to the public for access to the stores. As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact, and 'trespassing upon plaintiff's property' is one of the activities specifically enjoined. Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside the context of petitioner's other conduct we cannot know. The judgment

> therefore is vacated and the case remanded for proceedings not inconsistent with this opinion." (1 L. ed 2d at pages 616 and 617)

The instant injunction is ". . . . aimed narrowly at a trespass of this sort . . . ." and the question not presented in *Fairlawn* is presented here. Moreover, as we understand *Fairlawn*, the opinion does not indicate that the picketing on employer's property was carried on in such a manner as to obstruct the customers of the complainant in entering and leaving entrances to the store building.

In a recent case, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, —— U.S. ——, 20 L. ed 2d 603, 88 S. Ct. ——, decided May 20, 1968, the court reversed a judgment of the Supreme Court of Pennsylvania enjoining peaceful picketing in a shopping center. The United States Supreme Court said:

> ". . . . All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' March v. Alabama, 326 US, at 508, 90 L Ed at 269, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (20 L. ed 2d at pages 612 and 613)

Although complainant avers in its bill that it operates "a shopping center," we do not think that the findings of the trial court justify the conclusion that complainant's premises are a shopping center such as the one in *Logan Plaza* where the perimeter of Logan Valley Mall was a little less than 1.1 miles; the Mall contained two commercial enterprises, Weis Markets and Sears, Roebuck and Co. at the time of trial; and fifteen other commercial es-

tablishments were situated in the shopping center when the opinion was delivered. See Note 8, 20 L. ed 2d 611. Neither do we understand that the trespass was such that the picketing obstructed customers entering or leaving the store.

In the case at bar, as we understand it, the correctness of the trial court's findings is not challenged. The court found:

> ". . . . that a labor dispute exists between the Complainant, Weinacker's Inc., the employer, and the Respondents, Clifford Taggart, Riley Hobbs, James Stuckey and Retail Clerks Union, Local 458 of Mobile, that the Respondent, Retail Clerks Union, Local 458 of Mobile, of which the other Respondents are members, has been certified by the National Labor Relations Board as a bargaining representative for the employees of the Complainant, that numerous differences have existed and do now exist between the Complainant and parties Respondent over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the Respondent Union called a strike which is now in progress. Picket lines have been established by the Union on both of the public sidewalks of the City of Mobile immediately adjacent to the public streets and adjoining the real property of the Complainant on which its storebuilding is located and its business is conducted. Complainant, Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building, which is set-back from the public street on the east and on the south, which building and premises are under the single ownership of the Complainant. The main entrance to said building fronts on the public street (Government Street) to the south. Across Catherine Street (a public street)

to the east, Complainant operates an automobile service station. South of the front of Complainant's storebuilding and between it and the public street, complainant maintains a motor vehicle parking area for the use and convenience of its customers in parking their automobiles while in and about their business with the Complainant, and Complainant also maintains private walkways over its premises leading up to its storebuilding, and sidewalks around its storebuilding. Picketing was first carried on by the Respondents on the public sidewalks of the City of Mobile and later on the sidewalks on the Complainant's premises and in front of the entrances to Complainant's storebuilding. While this picketing on Complainant's premises and in front of the entrances to its building has been without any acts of actual violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of the Complainant in entering and leaving the entrances to said building on the south or Government Street side thereof. Said picketing in the manner heretofore described continued after the Complainant, through one of its officials, had requested the Respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of Complainant's premises to the public sidewalks of the City of Mobile adjoining the same. This Court's Writ of Temporary Injunction restrained and enjoined the Respondents, their agents, servants, employees and any and all persons acting in concert with them from trespassing upon the real property of the Complainant and from interfering (sic) with its property and the right of ingress and egress thereto."

In support of their contentions, respondents cite the following cases which we here number for reference below:

(1) *Toomer* v. *Local No. 995, IBEW*, (La. App.), 131 So. 2d 248; (2) *Barksdale and LeBlanc* v. *Local No. 130, IBEW*, (La. App.), 143 So. 2d 770; (3) *Broadcast Service of Mobile, Inc.* v. *Local 1264, IBEW*, 276 Ala. 93, 159 So. 2d 452; (4) *Maryland* v. *Williams*, 44 LRRM 2357, 37 Labor Cases, ¶ 65,708; (5) *Marsh* v. *Alabama*, 326 U.S. 501, 90 L. ed 265, 66 S. Ct. 276; (6) *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 363 P. 2d 803; (7) *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union*, 40 Cal. Rptr. 233; 394 P. 2d 921.

Three elements exist in the instant case to distinguish it from the cited cases; to wit, here, the injunction is sought and granted so that the trespass is narrowly enjoined;[1]

---

[1] The petition for immediate relief recites:

"O N E

"On January 21, 1965 this Honorable Court issued a fiat to the named Respondents ordering the request for an injunction to be set for a hearing at 9:30 Monday, January 25, 1965.

"T W O

"After receiving this notice actual or constructive, the Respondents [Clifford Taggart & Riley Hobbs (in ink)] have proceeded to constantly trespass upon the Complainant's property by marching or parading back and forth to the immediate doorway of the Complainant's place of business. Your Petitioner alleges that this conduct has been more intensive since the Court entertained the Complainant's petition and set the cause for hearing as described above and that such action on the part of the Respondents are at this time causing an irreparable injury to the Complainant in that the actions of the Respondents constitute obstructing customers from entering and leaving the Complainant's place of business and the Complainant alleges that the acts are outside the realms of peaceful picketing and constitute an immediate invasion of his property and his property rights contrary to the laws of the State of Alabama and the Constitution of the United States of America.

"T H R E E

"Your Complainant alleges that it is necessary to receive immediate injunctive relief to enjoin the continuous obstruct-

the trespass is on the premises of a single store owner; and the trespass obstructed customers using the entrances to the store. In none of the cited cases is the injunction so narrowly sought or granted.

In (1), the opinion indicated that the only witness testifying as to obstruction of access to the job site said that "his way was not blocked." 131 So. 2d at 252. In (2), it appears that there was no obstruction of entrances,

---

ing of the doorway to the Complainant's shopping center and that the Petitioner has no adequate remedy at law other than the facilities of this Honorable Court by enjoining the Respondents from such acts.

"FOUR

"Your Complainant respectfully prays that this Honorable Court issue a temporary writ of injunction after requiring the Complainant to enter into a bond with good and sufficient sureties as required by this Honorable Court.

"WHEREFORE, your Petitioner respectfully prays that the allegations of the Petition filed in this Court in this original cause as of January 21, 1965 be adopted and made a part hereof and that this Honorable Court forthwith order the Respondents and agents, servants or employees [and any and all persons acting in concert with (in ink)] from trespassing upon the property of the Complainant and from further interfering with the Complainant's property and right of ingress and egress to the Complainant's property and place of business and grant unto the Complainant all other fit and proper relief that the Complainant might be entitled to and shows unto the Court that an irreparable injury will result unless this Honorable Court grant the relief as so prayed."

The command of the writ of injunction is:

"These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from—TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS until the further orders of this Court. And this you will in no wise omit under penalty, &c."

and the picketing was not on property owned by or under control of the plaintiffs, and this is the case also in (3). In (4), the picketing was on the walkways of a shopping center which covered 46 acres with over 50 tenants, and picketing did not obstruct entrances. In (5), the activity was on the sidewalk of a company town and no obstruction was involved. In (6), the picketing was in a shopping center in which there were "numerous stores, banks and other enterprises." 363 P. 2d 803. Apparently the picketing was on the shopping center street and no entrance was obstructed. In (7), picketing was on sidewalks in a shopping center, and, also, so far as appears, without obstruction of entrances.

The court seems to justify the decision in *Logan Valley Plaza* on the conclusion that the shopping center streets had become quasi-public streets and the pickets would be disadvantaged if confined to the public streets outside the Mall. The premises of the instant complainant are not shown to have acquired the character of a town or business block as in *Marsh* and disadvantage to the pickets is not shown. Moreover, obstruction of customers using store entrances is present here but not in the cases cited by respondents.

It would be tempting to dispose of this case by saying that, because no person has suffered bodily assault or injury as a result of the activity here enjoined, the state court has no jurisdiction, but it appears to be our duty to dispose of the case the hard way as the reader of this opinion must have realized by now.

It is true that the evidence does not show that a blow has been struck or any blood shed, and, by some standards, the trespass or picketing may be described, perhaps correctly, as peaceful. The obstruction of a person's use of an entrance to a building by the presence of another person, however, can be accomplished only by using, or

threatening to use, physical force in some degree, large or small, depending on the restraint with which the persons involved govern their actions. Such obstruction can easily and quickly escalate into an affray which, even in the loose meaning of today's popular speech, cannot be properly called a peaceful affair.

Aside from the threat of violence which may be provoked by obstructing entrances, two cases support the conclusion that state jurisdiction over the trespass here enjoined has not been ousted. In *Moreland Corp. v. Retail Store Employees Union*, 16 Wis. 2d 499, 114 N. W. 2d 876, decided in 1962, the owner of a shopping center sought an injunction against picketing on a sidewalk in a shopping center. In deciding the issue of jurisdiction, the court said:

> ". . . . Even assuming the presence of the necessary federal jurisdictional requirements, the question of whether a state court may enjoin picketing as a trespass, in spite of arguable federal labor law pre-emption in other respects, has been expressly left open by the United States supreme court. *Amalgamated Meat Cutters & Butcher Workmen, Local No. 427, A.F.L. v. Fairlawn Meats, Inc.* (1957), 353 U.S. 20, 77 Sup. Ct. 604, 1 L. Ed. (2d) 613. We conclude that the courts of Wisconsin do have subject-matter jurisdiction to determine a controversy involving an alleged trespass by agents of a labor union. . . . .
>
> ". . . . . .
>
> "The issue is whether the respondent, because it has designed its private property for use as a shopping center, has lost its right to ban otherwise lawful picketing. If the record before us clearly established that the property involved is a multistore shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a

conclusion that the property rights of the shopping-center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing. See *Freeman* v. *Retail Clerks Union Local No. 1207, supra* (concurring opinion). See also Notes, 1960 Duke Law Journal, 310; Note, 73 Harvard Law Review, 1216, and Note, 10 Stanford Law Review, 694. Compare, *Marsh* v. *Alabama* (1946), 326 U.S. 501, 66 Sup. Ct. 276, 90 L. Ed. 265, in which the United States supreme court held that the freedom of religion guaranteed by the First and Fourteenth amendments prevented the enforcement of a criminal-trespass statute against a person distributing religious pamphlets on the sidewalk of a company-owned town. See also *National L. R. Board* v. *Babcock & Wilcox Co.* (1956), 351 U.S. 105, 76 Sup. Ct. 679, 100 L. Ed. 975, a decision under the National Labor Management Relations Act involving the right of labor union representatives to circulate literature in an employer's private parking lot. . . .

"In weighing the parties' conflicting interests of private property and free speech, we would want to know the physical characteristics of the shopping center so that our decision on this important policy question could be applied with clarity to other disputes which might arise. On the record before us, the precise nature of the shopping center is not fully disclosed. There are *some* details in the pleadings and in the affidavits; also, the photograph of the store in question is in the record. However, we conclude that the record presents an insufficient basis upon which to enter a summary judgment for the appellants. There being material facts in issue which necessitate a trial, the trial court properly denied the appellants' motion for summary judgment." (16 Wis. 2d at pages 503, 505, and 506)

Moreland is cited by the Supreme Court of the United States in Note 15 of the opinion to support the conclusion of the court in *Logan Valley Plaza*.

In *Hood* v. *Stafford*, 213 Tenn. 684, 278 S. W. 2d 766, decided in 1964, there was a history of proceedings before the National Labor Relations Board. The opinion recites:

> "Prior to the sale of the Weingarten stores, this union had sought to organize the employees of Pic-Pac. As a result of this effort, the National Labor Relations Board held an election on October 4, 1961 for the purpose of determining whether the employees of Pic-Pac desired the union to represent them as bargaining agent. At this election, 19 out of 90 votes cast were in favor of representation by the union. The election was contested and, as far as the record shows, that matter was still pending before the N.L.R.B., at the time of the trial of this case in the Circuit Court.
>
> "It further appears that there are also two other matters which at the time of trial were undisposed of before the N.L.R.B. One pertains to the dismissal on September 16, 1961 by Pic-Pac of two employees, and the other relates to Weingarten and its handling of the sale to Pic-Pac and its discharge of its employees. Unfair labor practice charges were filed by Pic-Pac with the N.L.R.B., with reference to the activity in question in this case. These charges were dismissed by the Board and no complaint was issued." (378 S. W. 2d at pages 767 and 768)

A picket had been arrested and convicted for violating a city ordinance by her picketing which is described as follows:

> "The defendant and other pickets were on the parking area of the Pic-Pac Store at Highland and Summer.

They were wearing placards, distributing circulars, and soliciting prospective customers, seeking to persuade these members of the public not to trade with Pic-Pac. At times defendant and others walked back and forth in front of the door to the store, which defendant estimated to be 200 to 300 feet from the public sidewalk. At other times defendant was out in the parking area of the parking lot. The prosecutor testified that at times it was necessary for customers to step around the defendant and another picket in order to get in the door to the store. He stated that about one-third of those approaching the door turned away and did not enter the store after being approached by the defendant or another picket. The defendant stated she could not estimate the number of persons who turned around and left the premises as a result of her activities. She was asked to leave the premises before being arrested." (378 S. W. 2d at page 768)

The Tennessee Court held that state jurisdiction had not been ousted, saying, among other things:

"Probably the most direct authority dealing with the questions presented in the petition for certiorari is People v. Goduto, 21 Ill. 2d 605, 174 N. E. 2d 385 (1961), in which the defendants were convicted in the Chicago Municipal Court of criminal trespass. The defendants entered the parking area of a Sears, Roebuck store for the purpose of distributing union leaflets and questionnaires to employees of the store. The superintendent asked them to leave the premises several times but defendants refused. He then had them arrested. The question of whether or not federal legislation had divested the state courts of power to deal with the activity involved was presented. The Supreme Court of Illinois affirmed the judgment of the Municipal Court. The United States Supreme Court denied certiorari without comment in 368 U.S.

927, 82 S. Ct. 361, 7 L. Ed. 2d 290. The Illinois Court, in that case, recognized that when an activity is protected by Section 7, or prohibited by Section 8, of the National Labor Relations Act, the state must abstain from regulation and, further, that when the activity is arguably subject to Section 7 or Section 8 of the Act, the states must yield to the primary jurisdiction of the National Labor Relations Board. The Court then stated:

> " 'The defendants have made much of the fact that there was no violence in this case. We believe, however, that this was due to the fact that the company did not resort to self-help to remove defendants from the premises. The defendants were on property occupied by Sears, Roebuck and Company. The company's agent believing the defendants had no right to be on the property ordered them to leave three times. The defendants believing they had a right to be there refused to leave. At this point the company called the police. If the State had not taken charge of the situation, the company would have had no alternative but to forceably remove the defendants. We cannot know the amount of force that would have been necessary to remove them, but the threat of violence in such a situation is imminent. See e. g., Marshall Field & Co. v. National Labor Relations Board, 7 Cir., 200 F. 2d 375.
>
> " '.....' " (378 S. W. 2d at pages 769 and 770)

The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not reasonably arguable that the Congress intended to exclude the states from jurisdiction over trespass by picketing on privately owned property, which does not have the quasi-public

character of a town street or business block, in a manner so as to obstruct entrances to a store.

We hold that the trial court in the instant case did not err in deciding that it had jurisdiction.

The respondents say, in their second particular, that the court erred in enjoining their union picketing activity because they have a constitutional right to picket peacefully as an exercise of freedom of speech. Without further lengthening this opinion, we hold that the court did not err in this respect because picketing involves something more than free speech, and because the right to picket must be balanced against the right of the owner to use his property in a lawful manner and the interest of the state in restraining trespass which is a potential cause of violence. So far as this record discloses, picketing on the streets abutting complainant's store lot is not materially less effective than picketing on the lot itself.

AFFIRMED.

Livingston, C. J., and Simpson and Kohn, JJ., concur.

Judgment of the Supreme Court of Alabama

SUPREME COURT OF ALABAMA —THURSDAY, SEPTEMBER 19, 1968

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, MERRILL, COLEMAN AND HARWOOD. ASSOCIATE JUSTICE KOHN NOT PRESENT.

1st Div. 295

CLIFFORD TAGGART, ET AL.

v.

WEINACKER'S, INC., a Corp.

MOBILE CIRCUIT COURT, IN EQUITY

Come the parties by attorneys and the record and matters therein assigned for errors being argued and submitted on motion and merits and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decree of the Circuit Court be in all things affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the appellants, Clifford E. Taggart and Retail Clerks' Union Local No. 458, and Reliance Insurance Company, surety for the costs of appeal, pay the costs accruing on said appeal in this Court and in the Court below, for which costs let execution issue.

The Supreme Court of Alabama — Thursday, November 7, 1968

[Caption omitted]

IT IS ORDERED that the application for rehearing filed on September 30, 1968 be and the same is hereby overruled.

Office Supreme Court
FILED
NOV 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL. *Petitioners*

v.

WEINACKER'S, INC. *Respondent*

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL. *Petitioners*

v.

WEINACKER'S, INC. *Respondent*

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 214 So. 2d 913 (A. 100-120). The opinion of the Circuit Court of Mobile County, Alabama, is unreported (A. 91-95).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 19, 1968 (A. 121). A petition for rehearing was denied on November 7, 1968 (A. 121). An order was entered on February 4, 1969 by Mr. Justice Hugo L. Black extending the time for

filing a petition for a writ of certiorari to April 5, 1969. The petition for a writ of certiorari, filed on March 28, 1969, was granted on October 13, 1969. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing on the publicly-used but privately-owned sidewalks adjacent to a store, in support of a strike by the store employees, called by the union certified by the National Labor Relations Board to represent them, to secure employment terms acceptable for work at the store after a breakdown of negotiations with the employer for a collective bargaining agreement. The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to adjudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the federal right to engage in "concerted activities for . . . mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in Appendix A (*infra*, pp. 1a-4a):

STATEMENT

A. The Physical Layout of the Area Surrounding the Store

In the city of Mobile, Alabama, respondent Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building. Weinacker's owns this building and the area which surrounds it. Within this area sidewalks encircle the building, walkways lead to it, and a motor vehicle parking lot for the use and convenience of the customers in parking their automobiles is located between the front of the building and the public property which adjoins the parking lot. The main entrance to the store building fronts to the south on the private sidewalk; the adjacent motor vehicle parking lot separates the store building and the private sidewalk from a public street called Government Street. The privately-owned area which surrounds the store building is bounded on three sides by public streets, Government Street to the south, Catherine Street to the east, and Macy Street to the west. Public sidewalks are adjacent to these public streets. Weinacker's also operates an automobile service station across Catherine Street to the east. (A. 91-92, 1-2.)[1]

[1] A diagram of the Weinacker property is annexed to this brief as Appendix B (*infra*, p. 5a). It shows that the perimeter of the property spans about 1,832 feet, or more than one-third of a mile. There are seven automobile entrances to the property. The distance between the nearest automobile entrance to the picketed store entrance is 115 feet; the distance between the farthest automobile entrance to the picketed store entrance is 385 feet; intermediate distances are 143 feet, 169 feet, 239 feet, 269 feet, and 364 feet. This diagram is not of record.

B. The First Request for Immediate Injunctive Relief

On January 21, 1965, Weinacker's filed its original bill with the Circuit Court of Mobile County, Alabama, against Retail Clerks' Union Local 458 of Mobile, Clifford Taggart, its business agent, Riley Hobbs, a member, and James Stuckey, its president, collectively called respondents (A. 1-6, 26, 88). The bill alleged that (1) Weinacker's "owns the . . . shopping center . . . and its parking area and walkways adjacent to the shopping center . . . used by the customers of the shopping center" (A. 1-2); (2) the three individual respondents "walked back and forth in front of the door or doors to the shopping center on the area owned and occupied" by Weinacker's "engaged in picketing the shopping center" (A. 2); and (3) this picketing constitutes an "unlawful trespass upon its premises" (A. 2). Claiming "irreparable injury" by a "continuous invasion" of its "property and property rights", Weinacker's prayed that the court "forthwith issue a temporary writ to enjoin" the Union and the individual respondents from "directly and indirectly . . . entering upon property of" Weinacker's and "that they be enjoined from any act on the property . . . which would be a trespass upon . . . property . . ." (A. 3). The court on the same day denied the request for temporary relief instanter and set the petition for that relief down for hearing on January 25, 1965 (A. 5). On January 22, 1965, the Union and the individual respondents moved to quash the bill on the ground that the court "has no jurisdiction over a lawful strike and the peaceful picketing activities connected therewith" in that the "National Labor Relations Board, federal statutes and procedures have preempted this field . . ." (A. 8).

C. The Second Request for Immediate Injunctive Relief

On January 22, 1965, after the court had set the request for temporary relief down for hearing, Weinacker's again petitioned "for immediate injunctive relief." It asserted that two named individual respondents "have proceeded to constantly trespass upon" Weinacker's "property by marching or parading back and forth to the immediate doorway of" its "place of business" and that "this conduct has been more intensive" since the petition for temporary injunctive relief had been set for hearing. It urged that "immediate injunctive relief" is necessary "to enjoin the continuous obstructing of the doorway to the . . . shopping center." (A. 9-10.) The request was supported by six conclusory and identically-worded affidavits averring that "Respondents have trespassed upon . . . [Weinacker's] property to the extent of obstructing the customers in entering and leaving the door of Weinacker's . . . and that the Respondents in carrying signs are acting in such a way as to interfere with . . . [Weinacker's] business and such action is on the private property" of Weinacker's (A. 11-14).[2] An *ex parte* injunction issued forthwith, without any notice or opportunity to be heard, prohibiting "trespassing upon the property of . . . [Weinacker's] and . . . interfering with . . . [Weinacker's] property and right of ingress and egress to the . . . property and place of business" (A. 15-16).

[2] The affidavits are so stereotyped that four of them describe the affiant as "he/she" with "he" or "she" crossed out to identify the gender (A. 11-12, 14).

D. The Plea to the Jurisdiction of the Court Based on the Preemption of the Subject Matter by the National Labor Relations Board

On January 25, 1965, the Union and the individual respondents filed a plea to the jurisdiction of the court (A. 17-26). The plea averred that the Union was a labor organization and Weinacker's an employer within the meaning of the National Labor Relations Act (A. 17); that the business of Weinacker's "affects interstate commerce within the meaning of the National Labor Relations Act, and its labor relations are subject to the exclusive jurisdiction of the National Labor Relations Board" (A. 24); that the activities of the Union and the individual respondents "constitute concerted activity for their mutual aid or protection, the right to engage in which is guaranteed and protected by the National Labor Relations Act" (A. 24); that "the National Labor Relations Board assumed jurisdiction over the subject matter of [Weinacker's] bill and said jurisdiction is exclusive" (A. 24); and that the jurisdiction of the court is "therefore pre-empted" (A. 25).

The plea documented the following specific facts: On December 19, 1963 the Union filed a petition with the NLRB seeking certification as the representative of certain of the employees of Weinacker's (A. 26, 27-30). On February 13, 1964, following a hearing held on January 20, 1964, the NLRB's Acting Regional Director, upon finding that Weinacker's is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction", directed an election in a unit composed of "All full time and regular part time employees at Employer's Mobile, Alabama, retail operation, including

ing office clerical employees and the grocery, produce, meat, drug, warehouse, and service station departments . . ." (A. 18-19, 30-33). An election was conducted on March 9, 1961, and resulted in a vote of 18 employees for the Union, 12 against, with 27 ballots challenged (A. 19, 37). On March 13, 1961, Weinsteker's filed objections to the conduct of the election (A. 19, 38-40). On April 10, 1961, following an investigation of the objections and the challenged ballots, the NLRB Regional Director issued a decision overruling the objections, resolving the challenged ballots, and certifying the Union as the representative of the unit of employees (A. 19-20, 40-41). On April 25, 1961, Weinsteker's requested the NLRB to review the Regional Director's decision (A. 20). On May 22, 1961, the NLRB denied the request because "it raises no substantial issues warranting review" (A. 20, 33-35).

On August 31, 1961, and again on September 16 and 30, 1961, the NLRB Regional Director issued a complaint against Weinsteker's alleging the commission of numerous unfair labor practices during the period from the filing of the representation petition through and after the Union's certification (A. 20-22, 41-50). In summary, the complaint alleged [illegible] interrogation of employees concerning their union activities, designation [illegible] threat of discharge of any employee who had anything to do with the Union, [illegible] surveillance of union meetings and activities, [illegible] employees would be discharged unless they were against the Union, [illegible] the right to engage in activities [illegible] formation [illegible] and [illegible] solicitation [illegible] and [illegible] solicitation with the store

(9) discharge of nine employees because of their union activity, (10) furnishing four employees less employment because of their union activity, and (11) denial of dining and rest room facilities to two employees because of their union activity (A. 69-73, 76-77, 79). The complaint further alleged that Weinacker's had defaulted in its bargaining obligation by (1) refusing to bargain in good faith, (2) refusing to furnish wage and related information relevant to bargaining, and (3) unilaterally changing existing employment terms (A. 74-75, 77). Weinacker's joined issue by a general denial (A. 22-23, 80-84), and on October 12, 1964, a hearing was begun before an NLRB trial examiner (A. 23).

The plea to the jurisdiction further averred that (1) the refusal of Weinacker's to bargain in good faith "led to a strike which was started by the Respondents on the 12th day of December, 1964" (A. 23); (2) "At no time has there been any force or violence resulting from the peaceful picketing on the part of the Respondents" (A. 23); and (3), to enjoin the Union's activities "would infringe upon the rights" of the Union and its members "under the First and Fourteenth Amendments to the Constitution of the United States" (A. 25), and would enter the domain preempted by the NLRB (A. 25).

At the time that the plea to the jurisdiction was entered, no decision upon the unfair labor practice complaint had been reached (A. 23). On April 15, 1965 the trial examiner issued, and on June 25, 1965 the NLRB adopted, his decision finding that Weinacker's had committed the unfair labor practices alleged. *Weinacker's Brothers, Inc.*, 153 NLRB 150

The decision summarized the unfair labor practices as follows (*id.* at 184-185):

> [I]t. Weinacker's] interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by the following conduct:
>
> (a) Unlawfully interrogating employees with regard to their concerted or union activities and sentiments.
>
> (b) Threatening employees that it would be futile for employees to select the Union as their bargaining representative if its employees struck.
>
> (c) Threatening employees that it would be futile for employees to select the Union as their bargaining representative if its employees struck.
>
> (d) Threatening employees with discharge because they were in favor of the Union.
>
> (e) Threatening employees that it would be futile for employees to select the Union as their bargaining representative, and that it refused to give them full employment at union scale.
>
> (f) Threatening employees with discharge or surveillance of employees' protected activities.
>
> (g) Soliciting employees to withdraw their union authorization cards and telling them to accomplish such action.
>
> (h) Promising a benefit to employees if they refrained from becoming members of the Union.
>
> (i) Prohibiting employees from wearing union buttons.
>
> (j) Promulgating and maintaining a rule prohibiting employees from wearing union buttons in violation of Section 8(a)(1) of the Act.

(k) Enforcing a no solicitation rule prohibiting solicitation by union officials while engaging in an extensive antiunion campaign in working areas and on employees' working time.

(l) Threatening to discharge an employee for responding to a subpena to testify in a National Labor Relations Board hearing instead of reporting to work.

[2. Weinacker's] violated Section 8(a)(3) and (1) of the Act by the following conduct:

(a) Discriminatorily discharging Burl Dock, Lorenzo Matthews, Harry Wright, Cleveland Dortch, Marguerite Etheredge, Mildred Turner, W. J. Williams, Elizabeth Boyette, and Sadie Burgess.

(b) Discriminatorily reducing the workhours of Elizabeth Boyette, Sadie Burgess, Jack Smith, and Donald Harris.

(c) Discriminatorily denying certain employees the dining and restroom facilities they had customarily used.

[3. Weinacker's] violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with said Union, commencing on May 25, 1964, as the collective bargaining representative of the unit described hereinabove.

On June 28, 1966, the Court of Appeals for the Fifth Circuit summarily enforced the NLRB order remedying the unfair practices found.

E. The Decision of the Circuit Court of Mobile County

On January 25, 1965, the same day that it was filed, the plea to the jurisdiction was overruled (A. 85). On February 1, 1965, the Union and the individual

respondents answered (A. 85-89). They averred that they had "legally picketed back and forth in front of the door of the shopping center" (A. 86); denied that they had "obstruct[ed] customers from leaving or entering . . . [Weinacker's] place of business" (A. 87), or that their conduct constituted an illegal trespass (A. 86); affirmed that their acts were within "the realm of peaceful picketing . . . legal under the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States" (A. 87); and reiterated that the court's jurisdiction was preempted (A. 86). The answer concluded with respondents' motion to dismiss the bill and to dissolve the injunction that had been issued (A. 87).

On March 26, 1965, more than two months after the *ex parte* injunction had issued, a nonevidentiary hearing of the motion to dismiss and dissolve was held (A. 90). On April 1, 1965, the Circuit Court issued its decision (A. 91-95). The court found that a labor dispute existed; that the Union had been certified by the NLRB as the representative of the employees of Weinacker's; and "that numerous differences have existed and do now exist between [Weinacker's and the Union] over the matter of a collective bargaining agreement between them and when contract negotiations broke down, the Union called a strike which is now in progress" (A. 91). The court further found that "Picketing was first carried on by the Respondents on the public sidewalks of the City of Madge and later on the sidewalks on [Weinacker's] premises and in front of the entrances to [Weinacker's] storebuilding. While this picketing on [Weinacker's] premises and in front of the entrances to its building has been without any acts of actual

violence or threats of violence to any persons, it has been carried out in such a manner as to obstruct the customers of . . . [Weinacker's] in entering and leaving the entrances to said building on the south or Government Street side thereof." (A. 91-92). The court further found that the picketing continued after Weinacker's, "through one of its officials, had requested the respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of . . . [Weinacker's] premises to the public sidewalks of the City of Mobile adjoining the same." (A. 92).

In considering the legal import of these findings, the court stated that "the first question in this case is whether or not the State Courts have jurisdiction to hear it. And, the second question is whether or not, if the State Courts do have jurisdiction of the subject matter, the Respondents are guilty . . . of the subject of injunctive relief." (A. 93). . . . As to the first question, the Court held that "where a store owner invites prospective customers to come to his store to trade and to park on his grounds made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for every purpose to the extent of making the use of the store owner's parking lot and sidewalks a purely private character . . . which the state courts [retain] jurisdiction to hear suits to enjoin peaceful picketing subject to the trespassing." (A. 94). As to the second question, the Court held that "if you could keep the Respondents from trespassing [the Complainant] presumably by locking, after hours, doors to Grayco [London of sporadic picketing subject to the Respondents' [the First and Fourteenth Amendments to the Federal Constitu-

tion, did not give them the right to remain on the parking area and sidewalks of . . . [Weinacker's] after they were ordered to leave" (A. 94).

The court concluded that it "does have jurisdiction of the subject matter involved in this suit which has not been divested by the National Labor Relations Act" (A. 94). It further concluded that "the Respondents, by going on . . . [Weinacker's] premises for the purpose of picketing the . . . storebuilding of [Weinacker's], were trespassers, and were employing an unlawful means of exercising their right to picket . . ." (A. 95). It decreed that the injunction "heretofore issued . . . be . . . continued until ordered dissolved by due process of law" (A. 96). That injunction prohibits "trespassing upon the property of . . . [Weinacker's] and . . . interfering with the . . . property [of Weinacker's] and right of ingress and egress to the . . . property and place of business [of Weinacker's]" (A. 15-16).

F. The Decision of the Supreme Court of Alabama

On April 9, 1965, an appeal was taken from the Circuit Court's judgment to the Supreme Court of Alabama (A. 96). The appeal was argued and submitted on November 10, 1965 (A. 99). The appeal was decided on September 29, 1966 (A. 100), almost three and one-half years after it had been taken and almost three years after it had been submitted. In the interim this Court on May 20, 1968 had decided *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, holding that the First Amendment forbids the issuance of a state court injunction prohibiting a trespass picketing at the premises of a store within a shopping center publicizing a union's labor dispute with the store.

The Supreme Court of Alabama affirmed the judgment of the Circuit Court (A. 121). On the question of preemption of state court jurisdiction, the Supreme Court held that (A. 119-120):

> The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not necessarily required that the Congress intended to uproot the state's [illegible] jurisdiction over trespass [illegible] privately owned property, which does not have the usual public character of a town street or business block, in a manner so as to obstruct [illegible]

On the question of the constitutional protection of picketing as free speech the Supreme Court held that (A. 120):

> The respondents say, in the second place, that the court erred in enjoining their peaceful picketing activity because they have a constitutional right to picket peacefully [illegible] freedom of speech. Without [illegible] this question, we think that [illegible] is to [illegible] more than free speech [illegible] the right to picket must be [illegible] the owner to use his property [illegible] which is a potential [illegible]

SUMMARY OF ARGUMENT

I

area and those passing through. . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put" *Id.* at 319-320).

And so, as the California Supreme Court has concluded in an identical situation, the single store's "sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights." *In re Lane*, 72 LRRM 2286, 2289 (August 20, 1969). Otherwise, just as in *Logan Valley*, "by erecting a '*cordon sanitaire*' around its store," the market operator would have "succeeded in immunizing itself from only the most public criticism." *Id.* at 2288-89.

II

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the NLRB. Section 7 of the Act encourages to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." Peaceful picketing publicizing a lawful position is a prominent expression of protected activity. And the picketing in this case is within the heartland of statutory solicitude. The Court has consistently held,

peaceful primary picketing incident to a lawful strike to be protected conduct under the Labor Management Relations Act.3 *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385.

The circumstance that peaceful picketing is conducted on the exterior grounds of the private, but opened property of a store does not empower a state court to act. The problem of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution belongs to the usual administrative routine of the Board. In a variety of contexts private property has been required to yield to the statutory guarantee of protected concert. The employer's property interest does not of itself control. "It is not every interference with property rights that is within the Fifth Amendment . . . . Inconvenience, or even some dislocation of property rights, may be necessary . . . to realize fulfillment of the rights conferred by the National Labor Relations Act. *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 802, n. 8; *N.L.R.B. v. Stowe Spinning Co.*, 336 U.S. 226, 232.

In short, one function of the NLRB is to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audiences cannot be defeated through the simple assertion . . . of a landlord's interest." *Hudgens*, 192 NLRB 25, 32. The NLRB is thus not "stripped of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing conducted on the exterior grounds of the private but open property of a store. It is the NLRB's business in the first instance to accommodate claimed conflicts

obstructive picketing to hold that "'picketing and trespassing' can be prohibited absolutely on . . . [Weinacker's] premises." *Ibid.* Obstructive picketing authorizes the elimination of the obstruction, not the elimination of picketing.

Nor can the court below justify the suppression of picketing by asseverating that its conduct on privately-owned but publicly used premises "is a potential cause of violence" (A. 120), or by prophesying that "obstruction can easily and quickly escalate into an affray . . ." (A. 115). This chimera of potential violence was identically present in *Logan Valley*, and it is as unavailing here, as it was there, to justify prohibition of picketing—"protected by the First Amendment" (391 U.S. at 313)[12]—in the vicinity of the store. ". . . [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 508.

Put another way, the injunction prohibits "trespassing upon the property" of Weinacker's (*supra*, p. 13), and that bans peaceful picketing anywhere on the exterior grounds of that property. The potential for violence is said to justify the bar. But it has been a very long time—and rarely even in the distant past—since it has been said that a risk of violence inheres in peaceful picketing and its outright ban is therefore justified on that account. This Court has upheld, only once and over vigorous dissent, a ban of peaceful picketing because it was enmeshed in a

[12] "[O]ur decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 152.

pattern of actual violence which gave the picketing a coercive effect whereby it would operate destructively as force and intimidation. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287. This ban of future peaceful picketing because of its past enmeshment in violence is highly exceptional. The usual course, even when picketing is marred by violence, is to prohibit the violence but permit the picketing. *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139-140; *U.M.W.* v. *Gibbs*, 383 U.S. 715, 729-732. But neither approach even comes to the fore unless there is actual violence. This Court has never sanctioned a ban of peaceful picketing because of a supposed but unmaterialized risk of violence which, were it a sound evaluation of the character of picketing, would inhere in all picketing at all times and everywhere. This Court has, indeed, expressly rejected this very notion. *Thornhill* v. *Alabama*, 310 U.S. 88, 105. It should not be resurrected at this late date just because, in the changing "circumstances of our times" (*id.* at 102), the locus of picketing has moved with the labor dispute into the property which the private owner has opened to public entry. In our industrial society peaceful picketing has long since been identified with unimpeachable orthodoxy as "**fair persuasion.**"[13]

5. The court below states that "picketing on the streets abutting . . . [Weinacker's] store lot is not materially less effective than picketing on the lot itself" (A. 120). This is neither relevant nor accurate. It is irrelevant because *Logan Valley* reiterates the teaching that "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other

[13] Restatement, Torts, § 779 (1939).

place.'" 391 U.S. at 323-324. It is inaccurate because "the difficulties and hazards to those attempting to exercise First Amendment privileges are as present here as they were in *Logan Valley*." *In re Lane*, 72 LRRM 2286, 2289 (Cal. Sup. Ct. August 20, 1969).

Pickets stationed at the automobile entrances to the parking lot are exposed to the risks of moving traffic. Motorists intent on turning from a busy street into the parking lot do not read picket signs and are hardly likely to be willing recipients of leaflets while driving. When the car is parked and its occupants move to the store, the picket signs are at their backs and they are no longer within reach of the leaflet distributor. And it requires many more pickets to man seven auto entrances to the parking area instead of one main entrance to the store itself. "It is therefore clear that the restraints on picketing and trespassing approved . . . here substantially hinder the communication of the ideas which petitioners seek to express . . ." (*Logan Valley*, 391 U.S. at 323).

In short, picketing on the public streets is screened from the store by the intercepting parking lot located in between. To confine the picketing to the public streets creates precisely that "*cordon sanitaire* of parking lots" around the store which *Logan Valley* condemns. 391 U.S. at 325. The immediate vicinity of the store is the natural and effective place to communicate the picket's message. The parking lot interposes a buffer between the communicant and his audience and therefore inescapably blunts the expression of First Amendment rights.

6. The court below states that the injunction barring picketing within Weinacker's premises is "'aimed

narrowly at a trespass . . .'" (A. 109, 112). To label the injunction "narrow" does not change its engulfing character. It works just the total exclusion from the premises, whether it be called regulation or suppression (391 U.S. at 321), which *Logan Valley* prohibits. Upon a proper showing of need an injunction may be narrowly drawn to control the number and location of pickets and the manner of picketing in the vicinity of the store. But to bar picketing altogether from the opened premises is the antithesis of a narrow injunction allowing picketing at the public place but circumspectly controlling its physical incidents.[14]

7. Accordingly, when the court below states, in support of the injunction, that "the right to picket must be balanced against the right of the owner to use his property in a lawful manner" (A. 120), all that it in reality asserts is the "claimed absolute right under state law to prohibit any use of . . . [the owner's] property without . . . [its] consent" (391 U.S. at 324). But "[n]aked title" is no more available in this case than it was in *Logan Valley* to justify total exclusion from property opened to the public. *Ibid.* It surely does not qualify as a "*compelling* governmental interest" sufficient to suppress the exercise of a constitutional right. *Shapiro* v. *Thompson*, 394 U.S.

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[14] "'An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 183-184.

618, 634. While petitioners have "amply shown" that their "activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner[s]' activities, which can justify the broad prohibitions which it has imposed." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 444; *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 7-8; *United Mine Workers of America, District 12* v. *Illinois State Bar Assn.*, 389 U.S. 217, 222.

In sum, the decision below in this case cannot stand compatibly with this Court's decision in *Logan Valley*. It is an experiment in circumvention of *Logan Valley's* plain import. That experiment must be put to an abrupt end. *Logan Valley* means that "the paramount and preferred place given to the First Amendment freedom of speech in our democratic system . . . should be accorded precedence over the mere 'naked title' . . . of [a] market owner[']s[] . . . interest in the premises." *In re Lane*, 72 LRRM 2286, 2289 (Cal. Sup. Ct. August 20, 1969). Regress from this teaching is retreat from the First Amendment.

II. Peaceful Picketing in a Labor Dispute Is Within the Exclusive Regulatory Scope of the National Labor Relations Act, and Therefore Within the Field Preempted by the National Labor Relations Board, Whether or Not Conducted on the Exterior Grounds of Privately-Owned but Publicly-Used Property.

The determination of a dispute over the allowability of picketing conducted on the exterior grounds of privately-owned but publicly-used property in the course of a labor dispute is initially within the sole

competence of the NLRB and therefore outside the jurisdiction of a state court.[15]

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the NLRB. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity.

"Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary

[15] This Court in *Logan Valley* did not reach the preemption question because decision was based on First Amendment grounds. 391 U.S. at 309-310, n. 1. Demurring from predicating the decision on the First Amendment, and regretting that the preemption question had not been properly preserved, Justice Harlan observed that "it seems clear . . . that the petitioner has a substantial preemption claim." *Id.* at 333-334. Justices Black and White, while dissenting from the conclusion that the First Amendment had been violated, separately emphasized that they did not reach any issue under the National Labor Relations Act. *Id.* at 329, n. 3; 340. The NLRB in its amicus brief in *Logan Valley* expressed the view that to "subject the picketing here to State court jurisdiction would entail a real danger of creating the very conflicts and 'frustration of national purposes' which *Garmon* and the other preemption decisions of this Court have sought to avoid". (br. pp. 5-6, 13).

picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, 498-499. Similarly, in regulating organizational and recognition picketing, Congress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters*, 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63.

The picketing in this case publicized a strike by the store's employees to obtain a satisfactory collective bargaining agreement from their employer after negotiations by their union certified as their representative had failed. It was therefore within the heartland of statutory protection. "The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the Labor Management Relations Act. 'Picketing has traditionally been a major weapon to implement the goals of a strike. . . .'" *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385. "The protected primary strike 'is aimed at applying economic pressure

by halting the day-to-day operations of the struck employer,' . . . and protected primary picketing 'has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt,' . . . including other employers and their employees." *Id.* at 388.

It is therefore clear that the state court in this case "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners." *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted on the exterior grounds of the private but opened property of a store does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution "'belongs to the usual administrative routine' of the Board."[16] In a variety of contexts private property has been required to yield to the statutory guaranty of protected concert.[17] "We

[16] *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130.

[17] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2). See also, *Interlake S.S. Co.*, 174 NLRB No. 55, 70 LRRM 1177, 178 NLRB No. 20, 72 LRRM 1008 (access by union organizers to ship while crew is in port to solicit union adherence).

have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression." [18]

The irrelevance to preemption of the fact that the picketing is conducted on the exterior grounds of the store's private but open property is appropriately elaborated in relationship to the reach of the injunction. The injunction in this case prohibits "trespassing upon the property" of Weinacker's by both employees and nonemployees of the store (A. 15-16, 95). It brings state jurisdiction into collision with federal authority whether the ban of picketing on the exterior store grounds is related either to the store employees or to nonemployees. We consider the situation of the employee first.

1. An employee cannot be barred from engaging in protected activity on his employer's premises simply because the employer owns the property. Specifically, it is settled that an employee may distribute union literature on his employer's parking lot, as indeed in any nonworking area (*Stoddard-Quirk Mfg. Co.*, 138 NLRB 615), so long as he acts on his nonworking time. *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 796-797. A rule restricting the exercise of this right is invalid "'in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.'". *Id.* at 803, n. 10. The control of littering and petty pilfering is no justification. *Id.* at 797. Nor is it germane that other

[18] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951. See also, *N.L.R.B.* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26, 29-30 (C.A. 2), enforcing as modified, 156 NLRB 233, 247-265.

means of communication are available to the employees. *Id.* at 798-799, 801. Nor is the employer's ownership interest decisive. "'It is not every interference with property rights that is within the Fifth Amendment. . . . Inconvenience, or even some dislocation of property rights, may be necessary. . . .'" *Id.* at 802, n. 8; *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226, 232.

In short, absent proof of special circumstances, the parking lot is available to the employee to distribute union literature.[19] The state injunction prohibiting employees from "trespassing upon the property" of Weinacker's in order to broadcast their strike is thus flatly incompatible with the federal rule. An employee on strike is still an employee (*N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345); the right to distribute union literature on the employer's parking lot extends to "all employees of a single employer—whether they are working, on strike or leave of absence or sick leave or temporary layoff or temporary transfer, or have been discriminatorily discharged or are about to quit . . ." (*Cranston Print Works Co.*, 117 NLRB 1834, 1842).[20] Accordingly, when a state injunction stops employees, by prohibiting "trespassing upon the property" of Weinacker's, from distributing handbills on the exterior grounds of the store publicizing the strike, it is at the least surely arguable that it forbids what the Na-

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[19] *National Steel Corp.* v. *N.L.R.B.*, 72 LRRM 2124 (C.A. 6, Sept. 3, 1969); *Republic Aluminum Co.* v. *N.L.R.B.*, 394 F. 2d 405 (C.A. 5); *United Steelworkers* v. *N.L.R.B.*, 393 F. 2d 661, 663 (C.A.D.C.); *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128 (C.A. 2), cert. denied, 376 U.S. 951; *Time-O-Matic, Inc.* v. *N.L.R.B.*, 264 F. 2d 96, 100-102 (C.A. 7).

[20] Enforcement denied on other grounds, 258 F. 2d 206, 213 (C.A. 4).

tional Act protects. And, in terms of protected presence on the store's exterior grounds, there is no distance at all between the employees' publication of their strike by handbill distribution and by picketing. Certain it is that the conduct is squarely within the statutory ambit of the National Labor Relations Act, and that places the determination of its incidents solely within the initial competence of the NLRB.[21]

"2. Commitment of the question to initial determination by the NLRB is equally clear when the injunction is related to the ban of picketing and handbill distribution on exterior store grounds by nonemployees. This is illustrated by the NLRB's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377): "It is open to the public for pedestrian use" (98 NLRB at 93). The Court of Appeals for the Seventh Circuit enforced the

[21] In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499). The "striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer—even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380.

NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the situation to the standard expressed by this Court in *N.L.R.B. v. Babcock & Wilcox*, 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike the exterior grounds of a store, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31*, 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the store's exterior grounds is crucial. To prohibit peaceful picketing or handbill distribution on otherwise open property is to hold that a "theoretical invasion" of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924).

The *Babcock & Wilcox* standard supports no such result. As the NLRB has observed, as part of its

rationale to support its finding that a store owner committed an unfair labor practice "when it prohibited a union representative from entering its parking lot to solicit membership from its employees," the "parking lot was open to the public and employees." *Priced-Less Discount Foods*, 162 NLRB 872, n. 1. Similarly, upon a finding that an industrial park was open to the public, the NLRB held that an employer and the park owner "cannot deny access to the premises to union representatives, whether it be for picketing or handbilling." *Solo Cup Co.*, 172 NLRB No. 110, 68 LRRM 1385, 1386.[22]

Furthermore, banning peaceful picketing or handbill distribution on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry to the property of every element of the public except that part of the community with a labor message directed at and adverse to the store is invidious. The Circuit Court justifies this discriminatory debarment on the explicit ground that, "where a store owner invites prospective customers to come to his store to trade and to park on his grounds, made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for *any* purpose to the general public . . . ." (A. 94). Conversely, therefore, it ex-

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[22] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston*, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

cludes other members of the public who by peaceful picketing or handbilling "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute." (*Thornhill* v. *Alabama*, 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[23]

The specific enmeshment of the instant controversy in the work of the NLRB is particularly plain. The NLRB found that Weinacker's had engaged in massive unfair labor practices designed to thwart union organization culminating in its refusal to bargain in good faith with the Union when the employees nevertheless chose collective representation (*supra*, pp. 8-10). This finding of unfair labor practices is directly relevant to the question of entry on the exterior store grounds to picket or handbill. In determining whether or not to require an employer to permit access to its property by nonemployee union representatives, and in prescribing conditions for entry when required, the NLRB takes into account the employer's commission of unfair labor practices. Thus, in requiring that a store parking lot used by the public be opened to entry by a nonemployee union organizer, the NLRB observed that the employer "had engaged in widespread unfair labor practices. . . ." *Priced-*

[23] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226.

Less Discount Foods, 162 NLRB 872, n. 1.[24] Similarly, in requiring that for six months nonemployee union organizers be given "access to [nonpublic] plant parking lots and plant approaches during nonworking time," the NLRB observed that the employer had "committed massive unfair labor practices which were, in substantial part, of a kind deliberately calculated to thwart the Union's attempts to communicate with employees through the usual channels." *Harlene Industries Corp.*, 166 NLRB No. 58, 65 LRRM 1626, 1632, enforced as modified, 406 F. 2d 886, 889 (C.A. 6). Whether or not the unfair labor practices committed by Weinacker's in this case are similarly relevant to the permissibility of picketing or handbilling in the immediate vicinity of its store only the NLRB can initially say. A state court has no power to determine the existence of unfair labor practices or their relevance to access to property as a remedy.

In short, whether viewed in relationship to exclusion of employees or nonemployees, debarment from the exterior grounds of the private but open property of the store offends the principle central to realization of the rights conferred by the NLRA. The promise of the statute is that the means and media of communication must be kept free and open. As stated

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[24] "Clearly the parking lot during off hours was a ready and effective place where employees could talk with the union organizer concerning organizational and union matters. It was a 'natural site' for the organizer to talk with selected employees . . . . The parking lot was the logical place for him to become acquainted with and to solicit new employees. Also the parking lot was a place where he could find any specific employee at the conclusion of his shift, because every employee had to use the parking lot in some way, either to go to a car and drive away, or to await the arrival of his pick-up. Indeed there was no place where the organizer could so easily make contact with the employees, old and new." 162 NLRB at 876.

in the Senate Report on Violations of Free Speech and Rights of Labor (S. Rep. No. 1150, 77th Cong., 2d Sess., Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

It is the function of the NLRB to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audience cannot "be defeated through the simple assertion . . . of a landlord's interest." *Harlan Fuel Co.*, 8 NLRB 25, 32.

The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing or handbill distribution conducted on the exterior grounds of the private but open property of a store. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of private property. Peaceful picketing and handbilling on the exterior grounds of a store are no exception. A state court retains the authority to control the physical incidents of picketing or handbilling on those grounds but it has no power to bar either altogether because of private ownership.

Accordingly, apart from narrow state regulation of the physical incidents of picketing or handbilling, the

elements of the controversy place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245. State jurisdiction is displaced so long as the dispute is within the class of conduct that the NLRB has been commissioned to deal with, regardless of whether or not the NLRB has taken the particular controversy in hand, as this Court has explained at length in *Garmon* (359 U.S. at 245-246):

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case we held that failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under

> the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

As the activity in this case is at the least "arguably protected," state intercession presents "the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." *Hanna Mining Co.* v. *District 2; MEBA*, 382 U.S. 181, 193.[25] Since "the peaceful picketing complained of in this case is such conduct, Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it." *Liner* v. *Jafco*, 375 U.S. 301, 306-307. Heedless of this principle, the state court in this case "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners." *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139.[26]

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[25] In other cases, the activity may be arguably prohibited as well, but preemption is of course still applicable.

[26] A number of state courts have concluded that picketing and handbilling on private but open property is within the preempted domain: *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 368 P. 2d 803; *Maryland* v. *Williams*, 44 LRRM 2357, 2362-64 (Md. Crim. Ct., June 10, 1959); *Weis Markets* v. *Retail Store Employees' Union, Local No. 692*, 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967).

III. The State Injunction Conflicts With Federally Protected Rights and Therefore Cannot Stand Even If the State Court Is Empowered To Adjudicate the Controversy.

While it would unhappily compel a return to "a now discarded approach to pre-emption" (*N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23),[27] a conclusion that the courts below are empowered to adjudicate the controversy requires this Court to decide whether the state courts rightly determined that the "activity enjoined in the instant case is . . . [not] protected by § 7 . . . of the National Labor Relations Act" (A. 119). For a State may not act in conflict with the command of Congress. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235. A "'State may not prohibit the exercise of rights which the federal Acts protect.'" *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75.

Peaceful picketing in support of a primary strike to secure improved employment terms is a preeminent expression of concerted activity for mutual aid or protection. "The Court has consistently held peaceful primary picketing incident to a lawful strike to be pro-

[27] In *Garmon*, speaking of *Automobile Workers* v. *Wisconsin Board* (*Briggs-Stratton*), 336 U.S. 245, this Court stated that the "approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application" (359 U.S. at 245, n. 4). As thereafter elaborated, "of special significance is the fact that the approach to pre-emption taken in *Briggs-Stratton* was that the state courts and this Court on review were required to decide whether the activities were either protected by § 7 or prohibited by § 8. This approach is 'no longer of general application,' . . . as this Court has since developed the doctrine in pre-emption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes. . . ." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23.

tected conduct under the Labor Management Relations Act . . . . [P]rotected primary picketing 'has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt,' . . . including other employers and their employees." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385, 388.

Primary picketing is enfeebled by removing it from the store entrance to the distant parking lot entrances. The removal screens the offending employer from picketing by interposing a parking lot between the workers and the situs of the dispute. The interposition of this buffer seriously weakens the workers' ability to enlist public support to refrain from patronizing or serving the struck store, to dissuade employees from taking jobs at the struck store as strike replacements, and to maintain the strikers' own solidarity and morale. This divorcement of the picketing from the immediate vicinity of the store is especially detrimental in this case because it further dislocates the balance of economic power between the workers and the employer which the massive unfair labor practices committed by Weinacker's had already badly disjointed (*supra*, pp. 8-10).

And assuming, but not granting (*supra*, p. 29, n. 11), that obstructive picketing took place, this factor would authorize no more than an injunction narrowly drawn to reach only the physically obstructive aspects of the picketing (*Youngdahl* v. *Rainfair*, 355 U.S. 131, 137-140; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-732), leaving its continuance at the situs of the dispute otherwise unmolested. Nor can the employer's bare property interest of itself justify banishment from the

exterior store grounds when the realization of a federal right weighs in the balance (*supra*, pp. 37-45).

Accordingly, absolute exclusion of all picketing from the immediate vicinity of the store results in state prohibition of "the exercise of rights explicitly protected by § 7" of the National Labor Relations Act, and such state denial of federal rights "cannot stand under the Supremacy Clause of the Constitution." *Division 1287, Amalgamated Association* v. *Missouri*, 374 U.S. 74, 82. In an area where federal law operates and is paramount, "the inconsistent application of state law is necessarily outside the power of the State." *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 296.

CONCLUSION

For the reasons stated the judgment should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, Et Seq.)

SEC. 2. When used in this Act—

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantialy equivalent employment. . . .

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b).

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

SUPREME COURT, U. S.

FILED
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No. 74

In the Supreme Court of the United States

OCTOBER TERM, 1969

CLIFFORD TAGGART, ET AL., PETITIONERS

v.

WEINACKER'S, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

On October 13, 1969, the Court granted certiorari in this case. The basic questions presented are: (1) whether the National Labor Relations Act preempts state court jurisdiction to enjoin peaceful picketing conducted on publicly used but privately owned sidewalks adjacent to a retail store for the purpose of supporting a lawful strike called by the employees' certified union representative; and (2) whether the injunction abridges free speech in violation of the First and Fourteenth Amendments to the United States Constitution.

Similar questions were presented to this Court two Terms ago in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, No. 478, October Term, 1967, 391 U.S. 308, and the Board filed a brief discussing the preemption question and urging reversal on that ground. However, this Court found that the preemption issue had not been raised in the state courts, and proceeded to consider the constitutional claim. 391 U.S. at 313 n. 6. In the present case the preemption issue was raised and passed upon by the state courts. Since that issue is jurisdictional, we assume that it will be reached and thus we reiterate the Board's views, as applicable to the facts of this case. See also the Board's *amicus curiae* memorandum in *International Longshoremen's Association* v. *Ariadne Shipping Co., Ltd., et al.*, No. 234, this Term.

STATEMENT

On May 22, 1964, the Board certified the Retail Clerks Union, Local 458, as bargaining agent for the 41 non-supervisory employees of Weinacker's, a retail grocery and department store in Mobile, Alabama (R. 53-54). On August 31, 1964, the General Counsel of the Board issued a complaint against Weinacker's alleging that it had committed numerous unfair labor practices in violation of the National Labor Relations Act, including a refusal to bargain in good faith with the Union, the discharge of nine employees for union activities, and other acts of restraint and coercion against union adherents (R. 68-80). A Trial Examiner of the Board began a hearing

on the complaint on October 12, 1964 (R. 23).[1] On December 12, 1964, the Union called the employees out on strike and began picketing Weinacker's in support of the strike and to protest the Company's alleged unfair labor practices (R. 23).

Weinacker's owns a large plot of land in downtown Mobile. On the plot are a large building where it conducts its business, sidewalks encircling that building, a parking lot for customers, and walkways leading from the lot to the store. The parking lot separates the main entrance to the store from Government Street to the south and Catherine Street to the east by a distance, at the nearest point, of about 100 feet. (See Pet. Br. 5a). Both are public streets with public sidewalks on the Weinacker's side; Weinacker's also owns and operates an automobile service station on Catherine Street opposite its store (R. 91–92). Initially, the picketing took place on the public sidewalk adjacent to Weinacker's parking lot. Later, the pickets moved to the privately owned sidewalk fronting the main entrance to Weinacker's store (R. 92).

On January 24, 1965, Weinacker's filed a complaint against petitioners—the Union and three of its officers—in the Circuit Court of Mobile County, Alabama. The complaint described the picketing on Weinacker's premises, characterizing it as an "unlawful trespass," and asked that the Union, its officials, their agents,

[1] The Examiner issued his decision finding unfair labor practices on April 15, 1965, and, the Company having filed no exceptions, the Board adopted his decision on June 25, 1965, 153 NLRB 459. The Fifth Circuit entered a decree summarily enforcing the Board's order on June 28, 1966. *National Labor Relations Board* v. *Weinacker Bros.*, No. 23,510.

and all persons acting in concert with them be enjoined from "directly and indirectly * * * entering upon property of" Weinacker's, and from any act of "trespass" thereon (R. 1-3). The Union moved to quash the complaint the next day, on the ground, *inter alia*, that the state court lacked jurisdiction because the picketing sought to be enjoined was within the exclusive primary jurisdiction of the National Labor Relations Board, and the state court was thus preempted by federal law (R. 8). On the same day Weinacker's obtained an *ex parte* temporary injunction, prohibiting petitioners from "trespassing upon the property of [Weinacker's] and from further interfering with * * * [Weinacker's] property and right of ingress and egress to [Weinacker's] property and place of business" (R. 15-16).

The Union reasserted its preemption defense in a plea to the jurisdiction of the Circuit Court, which was overruled, and in its subsequent answer to the complaint (R. 17-23). After a non-evidentiary hearing on the Union's motion to dismiss the complaint and to dissolve the temporary injunction, the Circuit Court issued a decree continuing the injunction previously issued "until ordered dissolved by due process of law" (R. 95). The court found that "a labor dispute exists" between Weinacker's and the Union "over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the * * * Union called a strike which is now in progress," and that "[p]icket lines have been established by the Union," first "on the public sidewalks

of the City of Mobile and later on the sidewalks on the Complainant's premises and in front of the entrances to Complainant's storebuilding" (R. 91–92). The court further found that, "[w]hile this picketing on Complainant's premises and in front of the entrances to its building has been without any acts of violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of the Complainant in entering or leaving the entrances to said building on the south or Government Street side thereof," and that said picketing had "continued after the Complainant * * * had requested the Respondents not to trespass on Company premises" (R. 92). Rejecting the preemption defense, the court concluded (R. 94):

> where a storeowner invites prospective customers to come to his store to trade and to park on his grounds made available thereto while doing business with the storeowner, the invitation is for one particular purpose, not for *any* purpose to the general public, and the use of the storeowner's parking lot and sidewalks is of a purely private character over which the State Courts retain jurisdiction to hear suits seeking injunctive relief to bar trespassing. * * *

The finding was supported by six conclusory and identically worded affidavits averring that the picketing had obstructed "customers in entering and leaving the door of Weinacker's" (R. 11–14); the Union's answer to the complaint denied that the pickets had obstructed customers from entering or leaving Weinacker's premises (R. 87).

On September 19, 1968 (almost three years after the case was submitted), the Supreme Court of Alabama affirmed the injunction issued by the Circuit Court. In rejecting the Union's preemption defense, it stated (R. 119–120):

> The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not reasonably arguable that the Congress intended to exclude the states from jurisdiction over trespass by picketing on privately owned property, which does not have the quasi-public character of a town street or business block, in a manner so as to obstruct entrances to a store.

ARGUMENT

THE STATE COURT LACKED JURISDICTION TO ENJOIN THE UNION'S PICKETING

A. THE PICKETING IS WITHIN THE AMBIT OF THE NATIONAL LABOR RELATIONS ACT

In *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 245, this Court held that, where "an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The picketing here is within the ambit of the Act.

"Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience

has shown are undesirable." *National Labor Relations Board* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 62. Indeed, Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Section 8(b)(4)(B)'s prohibition of secondary labor pressure carries the express reservation that nothing in the ban "shall be construed to make unlawful * * * any primary strike or primary picketing." See also *Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492, 498–499. And, in regulating organizational and recognitional picketing, Congress has, with certain qualifications, explicitly excepted from prohibition "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization * * *." N.L.R.A., Section 8(b)(7)(C). In short, unless peaceful picketing falls within one of the Act's specific prohibitions, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters Union*, 346 U.S. 485, 500.

The picketing in this case publicized a strike by the store's employees to obtain a satisfactory collective agreement from their employer, after negotiations by their Board-certified union representative had failed and the employer had engaged in numerous unfair labor practices. The picketing was carried on as close as possible to the situs of the labor dispute, the sidewalk immediately adjacent to the primary employer's

place of business. Such activity is a classic example of the type of concerted activity for mutual aid or protection safeguarded by Section 7 of the Act. "The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the National Labor Relations Act." *Brotherhood of Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385. "The primary strike * * * is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. * * * Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose transport is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt." *Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492, 498.

The picketing here was not removed from the ambit of the Act because it was conducted on the privately-owned sidewalk in front of Wanamaker's store instead of on the public sidewalk 100 feet away. Early in the administration of the Act, the Court recognized that the Board could make an accommodation between the employer's property rights and the employees' right to engage in organizational activity. It sustained the Board's ruling that an employer ban on union solicitation and literature distribution by employees in a plant and in the plant parking lot, during non-working time, constituted interference with organizational activity barred by Section 8(1) (now 8(a)(1)) of the Act. *Republic Aviation Corp.* v. *National Labor*

Relations Board, 324 U.S. 793.[4] Since that time, the Board has dealt with the problem of accommodation of these conflicting interests in a variety of contexts.[5]

To be sure, in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, the Court held, contrary to the Board, that the employer did not unlawfully interfere with organizational activity by refusing to permit distribution of union literature by non-employee union organizers on a company-owned parking lot. In so ruling, however, the Court did not hold that the Board lacked power to balance the employer's property interests against the employees' organizational rights, but merely rejected the particular accommodation made by the Board in that case. Thus,

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[4] See, *e.g.*, *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (union organizer granted access to the only available meeting hall in a company town where that hall had been used for other "public" purposes); *National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (C.A. 6) (union organizer granted access to company-owned logging camp to solicit membership); *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. 2d 149 (C.A. 2) (union representative granted access to company ship to discuss grievances with unlicensed personnel); *Fafnir Bearing Co.* v. *National Labor Relations Board*, 362 F. 2d 716 (C.A. 2) (union representative granted access to plant to conduct an independent time study); *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375, 380 (C.A. 7) (union solicitation by non-employees permitted on a company-owned street connecting two company buildings, where the street was generally used by the public); and cases cited, *infra*, pp. 12–15.

[5] See also *Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492, 499 (primary character of picketing not affected by the fact "that the picketed gate * * * was located on property owned by New York Central Railroad and not upon property owned by the primary employer").

the Court recognized that, even on the private property there involved, the employer could not bar non-employee union organizers if there were a showing (absent in *Babcock*) that "reasonable efforts by the union through other available channels of communication [would not] enable it to reach the employees with its message" or that the employer had discriminated "against the union by allowing other distribution" [illegible]

[illegible] As the Court pointed out in *Garmon*, *supra*, the basic consideration underlying its preemption decisions is that "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency armed with its own procedures and equipped with its specialized knowledge and cumulative experience." 359 U.S. at 242. "To leave the States free to regulate conduct . . . plainly within the central aim of federal regulation," the Court added, "involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* at 244. As we have shown, protection of peaceful picketing on property within the central

[illegible]

[illegible] This is not a problem of plant-space in which [illegible] organization [illegible] property. Organization rights are granted to workers by the same statutes that [illegible] that protect property rights. Accommodation between the two must be obtained with a due regard for the preservation of the one as well as the maintenance of the other

aim of federal regulation." To subject the picketing here to state court jurisdiction would entail a real danger of creating the very conflicts and frustration of national purposes which *Garmon* and the other pre-emption decisions of this Court have sought to avoid.

While the prior cases involved organizational picketing rather than a strike, the same principles apply to picketing in support of a strike. Determination whether the Act affirmatively protects the union and its employee-members in picketing Weinacker's on its privately owned sidewalks immediately adjacent to its store would entail for the Board a delicate balancing of the respective interests involved. The balancing would take into account a variety of factors—*e.g.*, whether the activity was engaged in by employees or by outside union organizers, the extent to which the property involved had been opened up to the public for other purposes, whether the company's efforts to restrict picketing were necessary in order to protect its business operations or motivated by a desire to choke off organizational activity, and whether there were alternative places available where the picketing would be effectively carried on. These factors were not taken into account by the state court. It considered only the factors of trespass and alleged obstruction of Weinacker's store, and prohibited both employees and non-employees of the store from "trespassing upon the property" of the store simply on the

Section 8(a) (1) and (3) of the Act makes it an unfair labor practice for an employer to discharge or otherwise discriminate against employees for engaging in activity protected by Section

theory that Weinacker's owned the land on which the picketing occurred and had not given permission for it to be used for that purpose.

To illustrate more specifically the conflict between the state court injunction and the Act's regulatory scheme: The Act permits an employee to distribute union literature and solicit union membership on the employer's parking lot or in other nonwork areas, on nonworking time. A rule restricting the exercise of this right is invalid "in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 803, n. 10. Nor is it normally that other means of communication are available to the employees, *id.*, at 795, 799, 801, or that the union is publishing grievances and organizing. Insofar as the

represent, through picketing and other means of publicity. As this Court recognized in *Babcock & Wilcox* (*supra*, p. 10), non-employees are entitled to have access to an employer's grounds for legitimate union activity where, as here, those grounds have been opened to the public for other purposes. In *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375, 380, 382 (C.A. 7), the court sustained a Board finding that an employer had violated Section 8(a)(1) of the Act by barring non-employee union organizers from a street which, although privately owned, had been opened to the public. Similarly, in *Priced Less Discount Foods, Inc., d/b/a Payless*, 162 NLRB 872, n. 1, 877, the Board found that an employer violated Section 8(a)(1) of the Act wherein excluded from its parking lot a non-employee union representative seeking to solicit membership among its employees, although it had allowed other non-employees to use the lot to solicit for their purposes. A like violation was found in *Solo Cup Company*, 172 NLRB No. 110, 68 LRRM 1385, July 10, 1968, where an employer excluded non-employee union organizers from a privately owned industrial park housing the employer's plant; the Board based its finding upon conclusions that (1) "it would be virtually impossible for the Union, without a list of addresses, which Solo [] has refused to supply, to meet the Solo employees away from the plant premises and convey its message"; (2) "in view of the unlimited accessibility to the area established by past practices it has become through custom and use a quasi-public area"; and (3) the reason assigned for

barring or ejecting the organizers was "their union affiliation" (68 LRRM at 1386-1387).[9]

Finally, the Board found that Wemacker's had engaged in extensive unfair labor practices designed to thwart union organization, culminating in its refusal to bargain in good faith with the Union (*supra*, pp. 2-3, n. 1). Although it did not do so in this particular case, the Board has power to remedy such unfair labor practices by requiring that the employer's private property be opened to non-employee union representatives for a reasonable period of time. *Marlene Industries Corp.*, 166 NLRB No. 58, 65 LRRM 1626, 1632, July 3, 1967, enforced in this respect *sub nom., Decatur ville Sportswear Co. v. National Labor Relations Board*, 406 F. 2d 886, 889 (CA. 6). The state court injunction would collide with the Board's action should it deem it appropriate to provide such a remedy in any future cases involving Wemacker's.

For these reasons, the state court here, no less than in *Garmon, supra*, has regulated conduct which is "so plainly within the central aim of federal regulation" that a potential interference with the federal regulatory scheme can be avoided only by requiring the state court to "defer to the exclusive competence of the National Labor Relations Board" (359 U.S., at 241, 245), just as Missouri was precluded from applying its

[9] Cf. *General Electric Co.*, 137 NLRB 1549 (employer could properly exclude non-employee union solicitors from a privately-owned road leading to the plant, where adequate opportunity existed for reaching the employees at the public road entrance to the plant and there was no showing that other solicitation had been permitted on the private road).

antitrust laws to the union activity involved in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, so here Alabama may not "interfere with the National Labor Relations Act . . . apply its trespass laws broadly or blanket-fashion the Union's picketing on Wumbco's premises."

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed, and the case should be remanded with directions to vacate the injunction and dismiss the complaint for want of jurisdiction.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL., *Petitioner*,

v.

WEINSTEIN'S INC., *Respondent*.

On Writ of Certiorari to the Supreme Court of Alabama

MOTION OF AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

and

BRIEF OF AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

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MOTION OF AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Comes now the American Retail Federation (hereinafter called "Federation") by its attorneys, Brice I. Bishop and Phil B. Hammond, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae* supporting the position of Respondent and urging affirmance of the decision of the Supreme Court of Alabama for the following reasons:

1. The Federation is an organization composed of seventy-eight national and state retail associations.

The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

2. The Federation has previously appeared as *amicus curiae* before this Court in labor relations matters which affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved the appropriate standards for determining who is an independent contractor under the National Labor Relations Act;[1] the appropriate standards for regulation by state courts in cases of shopping center picketing;[2] and the appropriate standards for issuance of a Board order to compel employers to bargain based on union authorization cards.[3]

The subject matter of the instant case—the appropriate standards for regulation by state courts in cases of picketing on the private premises of an individual store—is similarly a matter of substantial concern to the Federation. The large regional shopping center, such as that involved in *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308, accounts for

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[1] Brief *Amicus Curiae* in *National Labor Relations Board* v. *United Insurance Company of America* 390 U.S. 254.

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308.

[3] Brief *Amicus Curiae* in *Sinclair Company* v. *NLRB,* 395 U.S. 575, and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB* v. *General Steel Products, Inc.,* 395 U.S. 575.

only a small proportion of the total retail sales in the United States.[4] It is the instant case, therefore, rather than *Logan Valley* which potentially will establish the guidelines for most of the retail industry.

3. The interest of the Federation is predicated upon these substantial and far-reaching consequences of any result in the instant case. The concern of the *amicus* is that the Court, in formulating the principles to govern the particular dispute involved in the present case, should have the benefit of the Federation's experience and views, which may not otherwise be presented in the arguments of the parties,[5] in order to be aware of the broader ramifications of its decision herein.

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[4] As of January 1965, there was a total of 8,076 shopping centers in the United States. Approximately 60%, or 4925 of the centers, had a gross leasable area of less than 100,000 square feet. Another 25%, or 2,066 centers, had a gross leasable area of between 101,000 and 200,000 square feet. These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,076 centers were "medium size" (201,000 to 400,000 square feet); but 316 were "large" centers (401,000 to 800,000 square feet); and merely 73 of the 8,076 centers were super regional shopping centers with gross leasable area in excess of 800,000 square feet. Moreover, the large and regional shopping centers accounted for less than one-fourth of the estimated annual sales of all shopping centers and only a very small percentage of the total retail sales in the United States. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1967, pp. 27-9.

[5] See, e.g., *United States* v. *White Motor Company*, 372 U.S. 253, 263 (1963), where in remanding a case involving territorial restrictions in manufacturer-retailer franchises, this Court stated that the territorial limitations "may or may not have that purpose or effect of stifling competition. We don't know enough of the economic and business stuff out of which these arrangements emerge to be certain."

4. Counsel for all parties have been requested to consent to the Federation's filing a brief as *amicus curiae*. Permission was obtained from Respondent but, by telephonic advice of December 23, 1969, counsel for Petitioner declined to grant such consent. If permission is granted to file a brief as *amicus curiae*, it will be short and relevant so that the Court's time will not be misspent.

Respectfully submitted,

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BRIEF OF AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereinafter referred to as the "Federation") is an organization composed of seventy-eight national and state retail associations. The membership of these associations con-

sists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The Federation has previously appeared as *amicus curiae* before this Court in labor relations matters which affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved the appropriate standards for determining who is an independent contractor under the National Labor Relations Act;[1] the appropriate standards for regulation by state courts in cases of shopping center picketing;[2] and the appropriate standards for issuance of a Board order to compel employers to bargain based on union authorization cards.[3]

The subject matter of the instant case—the appropriate standards for regulation by state courts in cases of picketing on the private premises of an individual store—is similarly a matter of substantial concern to the Federation. The large regional shopping center, such as that involved in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, accounts for only a small proportion of the total retail sales in the

[1] Brief *Amicus Curiae* in *National Labor Relations Board v. United Insurance Company of America*, 390 U.S. 254.

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308.

[3] Brief *Amicus Curiae* in *Sinclair Company v. NLRB*, 395 U.S. 575, and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB v. General Steel Products, Inc.*, 395 U.S. 575.

United States.[4] The major sources of such sales, conversely, are either small shopping centers,[5] single urban stores,[6] discount stores[7] and so-called "highway

[4] As of January 1965, there was a total of 8,076 shopping centers in the United States. Approximately 69%, or 1925 of the centers, had a gross leasable area of less than 100,000 square feet. Another 25%, or 2,006 centers, had a gross leasable area of between 101,000 and 200,000 square feet. These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,076 centers were "medium size" (201,000 to 400,000 square feet); but 316 were "large" centers (401,000 to 800,000 square feet); and merely 73 of the 8,076 centers were super regional shopping centers with gross leasable area in excess of 800,000 square feet. Moreover, the large and regional shopping centers accounted for less than one-fourth of the estimated annual sales of all shopping centers and only a very small percentage of the total retail sales in the United States. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, summer 1967, pp. 27-9.

[5] *Ibid.*

[6] Retail sales in the Bureau of the Budget Standard Metropolitan Statistical Areas as of 1963 accounted for approximately 70% of the total national retail trade, and less than 18% of this figure was made in stores located in non-urban areas. *Id.* at 27-8. In these urban areas, single store retail enterprises, such as that involved in the instant case, and multi-tiered department stores, rather than large regional shopping centers, are the usual mode of retail operation.

[7] As of June 1966, there were 2,684 discount stores in the United States with annual sales approaching that of the combined large and regional shopping centers. Such stores had an average floor area of 64,000 square feet and, on the average, derived 22% of their sales from the sale of food items, such as that principally sold by the Respondent herein. *Id.* at 29-34. The significance of such stores was noted thusly by Prof. Applebaum:

> "The development cycle of discount stores has been very rapid—much faster than for supermarkets, shopping centers, and branch department stores. Supermarkets began to expand vigorously about thirty years ago. Shopping centers

retailers." Such retail establishments have in common with the large shopping centers a desire to maximize the accessibility of the public to their premises. It is an integral component of every retail business that it be freely open to the public; such openness is true of the parking lot as well as the selling area and of the giant regional shopping center as well as the small single-store establishment.

In other salient characteristics, however, there are significant differences between the *Logan Valley* type shopping center and other retail establishments. The latter operations may offer more than one line of merchandise, not through the medium of varied separate and independent operations, as in the case of a large shopping center, but instead by means of leased de-

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and branch department stores have had their dramatic growth for the past fifteen years. Discount stores have mushroomed, particularly during less than a decade, but their development has been uneven from state to state, just as in the case of shopping centers.

A large discount store with a food department is essentially a shopping center in itself, today and tomorrow . . ." *Id.* at 31 (emphasis supplied).

"Highway retailing" was described by Professor Applebaum as a typically free-standing . . . establishment . . . [which] depends entirely on automobile traffic passing by or going to the suburbs, the retail [establishment] is more dependent . . . Emphasis the author's. This "growth segment of the retail industry involves not only gasoline stations, restaurants and motels but, in addition, includes a proliferation in recent years of other types of business such as supermarkets, drug stores, variety stores, candy stores, furniture stores, garden supply stores, [gas stores, and still others, including] grocery stores. [While each of these stores] has one thing in common, they have ample space for automobile traffic and plenty of *parking space.*" *Id.* at 31 (emphasis supplied). Again, it appears that a substantial portion of the retail industry closely resembles the Weinacker's store involved in the present case rather than the large retail shopping center of *Logan Valley*.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW DOES NOT ABRIDGE THE CONSTITUTIONAL RIGHTS OF PETITIONERS

The core of Petitioners' argument is the contention that "an employer who opens his property to the public—to customers in order to secure their patronage of his store and to others in the community to operate his store—cannot close his property to employees who seek by peaceful picketing in the immediate vicinity of the store to publicize the store's disfavored labor policy" (Pet. Br., p. 14).[10] This sweeping declaration is comprised of a series of unwarranted assumptions:

> *First*, it assumes that, once an employer opens his private property for any purpose to the public, he thereafter has an automatic corollary obligation *in every case* to permit peaceful picketing thereon.
>
> *Second*, it assumes that once an employer opens his private property for any purpose to the public, he thereafter has an automatic corollary obligation to permit peaceful picketing *at any site* thereon "in the immediate vicinity" which may be chosen by the pickets.

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[10] The Petitioners have properly confined the issue here involved to communication "for a purpose consonant with the use to which the property is actually put" (Pet. Br., p. 16), i.e., "to publicize [Weinacker's] disfavored labor policy." The Federation concurs with the Petitioners and Amicus Homart Development Co. that the separate and independent matter of communication for other purposes, a question specifically left unresolved in *Logan Valley* (391 U.S. at fn. 9), is not before the Court in the instant case and this brief, accordingly, will not address itself to that issue.

> *Third,* it assumes—and later directly admits (Pet. Br., p. 31)—that once an employer opens his private property for any purpose to the public, he thereafter has an automatic corollary obligation to permit peaceful picketing thereon *and the availability of effective alternative locations to engage in such activities is "irrelevant".*

These assumptions substantially distort the holdings, as well as the reasoning, of *Logan Valley* and its predecessors. They seek solace in an all-inclusive generalization to govern every situation. They fail to recognize, in short, the difficult but necessary responsibility of the courts to strike a balance, in the factual situation of each particular case, between the conflicting Constitutional rights at issue in this area of strongly-held feelings and concern.

A. There Is No Unfettered Right To Engage in Peaceful Picketing in All Places

This Court has repeatedly emphasized that "[a] state is not required to tolerate in all places . . . even peaceful picketing by an individual"[11] and that "[e]*ven where municipal or state property is open to the public generally,* the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State."[12] And certainly the power of Respondent "to make reasonable regulations governing the exercise

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[11] *Gibonev* v *The Empire Storage & Ice Co.*, 336 U.S. 490, 500-1, quoting *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 79 (emphasis supplied). See also *Hughes* v. *Superior Court*, 339 U.S. 460 and *Building Service Union* v. *Gazzam*, 339 U.S. 532.

[12] *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 320.

of First Amendment rights on [its] property . . . [is] at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court, to control the use of public property." [13]

The assumption that the Fifth Amendment rights of property owners must yield to the First Amendment rights of pickets in *every* instance where the property involved is open to the public generally has thus been conclusively rejected by this Court. The question here presented is a far different one: in what instances must there be such a subordination of the owner's property rights or, in other words, "in what circumstances can private property be treated as if it were public?" [14]

B. Reasonable Regulation of Picketing on Private Property Includes the Right To Limit the Place Thereof

The Petitioner's second assumption—that peaceful picketing must be permitted "in the immediate vicinity" of private property open to the public—presupposes that "openness of the property to public entry is the only viable standard" and that "[w]hat matters is whether the property has been opened to the public" (Pet. Br., pps. 23-4). But, as previously noted, both the interior and the exterior of retail establishments are by their very nature open to the public; "[a]ny store invites the patronage of members of the public interested in its products".[15] If such openness is the only "viable standard", then it must follow that there

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[13] *Ibid.*

[14] *Id.* at 332 (dissenting opinion of Mr. Justice Black).

[15] *Id.* at 339 (dissenting opinion of Mr. Justice White).

is an absolute right to picket on the checkout counters of a store, in the aisleways of the selling floor, in the customer pickup areas, on the loading dock or at any other location that the pickets may believe will have the maximum disruptive effect.

Surely this is not the rule. While the Court in *Logan Valley* did not there find it necessary to determine "the extent to which respondents are entitled to limit the *location* . . . of the picketing" (391 U.S. at 321; emphasis supplied), the clear implication of the decision is that in the appropriate case the employer would be entitled to impose such a limitation.[16] Indeed, both the Union[17] and the National Labor Relations Board,[18] as *amicus*, in *Logan Valley* readily conceded this point. And this Court in other cases has similiarly required that labor organizations accept less desirable means of communication where the method sought would either

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[16] Cf. *id.* at 328-9 (dissenting opinion of Mr. Justice Black):

> "It seems clear to me, in light of the customary way that supermarkets now must operate, that pickup zones are as much a part of the stores as the inside counters where customers select their goods or the checkout and bagging sections where the goods are paid for. I cannot conceive how that such a pickup zone, even by the wildest stretching of *Marsh* v. *Alabama*, 326 U.S. 501, would ever be considered dedicated to the public or the pickets . . . it would be just as sensible for this Court to allow the pickets to stand in the checkout counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pickup zone which interferes with customers' loading of their cars."

[17] *Id.* at fn. 4. See also the decision of the lower court in *Logan Valley*, 425 Pa. 382, 227 A.2d 874, at fn. 5.

[18] Brief of *amicus* NLRB (at p. 17) which concedes that in the case of picketing in the interior of a store "the interest of the State in providing a remedy for that conduct is so great . . . that the State would not be barred from acting."

unduly infringe on the rights of other parties[19] or violate the legitimate public policies of the States.[20]

Numerous limitations have, in fact, been placed by the Board and courts on the right to picket, or even engage in less provocative forms of communication, in locations generally open to the public. For example, handbilling, an activity which Petitioners admit "involves no patrol and evokes no responses other than those which flow from the content of the appeal itself" (Pet. Br., p. 28), as well as other forms of union solicitation have been banned from the selling floor of department stores.[21] Unions have also been restricted from picketing in the immediate vicinity of multistoried buildings[22] and from engaging in "common situs" picketing.[23] All of these activities were sought to be conducted on what the union regarded as their "natural and effective place," and their prohibition may have resulted in creating a "*cordon sanitaire*" or "buffer between the communicant and his audience" as Petitioners claim to be the effect of the decision below. Yet in each case the communication was regulated, as it was here, because of its interference with

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[19] See, e.g., *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722.

[20] See, e.g., *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.

[21] *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375 (C.A. 7, 1952); *May Department Stores*, 59 NLRB 976.

[22] *Cf. NLRB* v. *District 65, Retail, Wholesale Department Store Union*, 375 F.2d 745 (C.A. 2, 1967); *Gimbel Brothers, Inc.*, 100 NLRB 870.

[23] *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675; *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547.

the equally-protected rights of others and the availability of other effective channels of communication.

In *Logan Valley,* Justice White properly expressed concern that the Court "might draw a line between 'shopping centers' and other business establishments which have sidewalks or parking on their own property." [24] Similar concern might well also be expressed for those establishments which are located in an enclosed mall [25] or which have virtually indistinguishable concessions or leased departments contained in the interior of their store or which are located in a multi-story downtown building [26] or which, instead of operating their own parking lot, lease out this operation or provide for an alternative thereto such as compensating customers for the use of an adjacent public parking facility. All of these situations, as well as a myriad of others, are potential arenas where the First Amendment rights of pickets may clash with the Fifth Amendments rights of property owners.

Resolution of such conflicts cannot be accomplished by means of a rote formula or meaningless inquiry to

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[24] 391 U.S. at 339.

[25] See, e.g., the brief of *amicus* Homart Development Co. in the instant case.

[26] The fear of the majority in *Logan Valley* was that, if the picketing there desired was precluded, the effect would be to permit "businesses situated in the suburbs . . . [to] largely immunize themselves from . . . criticism by creating a *cordon sanitaire* of *parking lots around their stores*." Id. at 325. But do not the numerous retail operations and businesses open to the public which are located on other than the street floor of a multi-storied downtown building, or which are operated as concessions or leased departments within a downtown department store, similarly create a "*cordon sanitaire*" which "immunizes" themselves from similar criticism?

determine "the openness of the property to public entry" as Petitioners suggest. Rather, each case must be judged on its own facts and, as in *Logan Valley*, a balance obtained which seeks neither to "substantially hinder . . . the communication of ideas" nor to "significantly interfere . . . with the use to which the [private] property [is] being put by both respondents and the general public."[27] The remedy fashioned, accordingly, must "ensure non-interference with customers and employees, while enabling the union members to assemble sufficiently close to [the store] . . . to make effective their First Amendment rights."[28] When, as here, such an accommodation is reached and such a remedy fashioned, the picketing is properly enjoined without any abridgement of the pickets' Constitutional rights.

C. The Availability of Other Effective Alternative Channels of Communication as Well as the Undue Interference Occasioned by the Picketing Fully Justify the Remedy Fashioned by the Court Below

Contrary to the Petitioners' assumption, the availability of effective alternative locations for it to engage in its desired picketing is not an "irrelevant" consideration. While one may not be required to have "the exercise of his liberty of expression" abridged on the basis that it may be exercised elsewhere,"[29] there is, in fact no abridgment of any "liberty of expression" where effective alternative channels of communication are open. It was the very absence in *Logan Valley* of any such effective alternative which caused the Court

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[27] *Id.* at 323.

[28] *Id.* at 326 (concurring opinion of Mr. Justice Douglas).

[29] Pet. Br. at p. 31 citing *Logan Valley* (391 U.S. at 323-4).

in that case to find that the State restraint imposed "substantially hinder[ed] the communication of the ideas which petitioners seek to express" (391 U.S. at 323) and, in view of the absence of any countervailing claim to protection of the respondents' normal business operation, to conclude that the appropriate balance there necessary should be in favor of the plaintiffs. Similarly, it was the power and influence exercised by the *Marsh*[30] company town owner to censor the avenues of communication available to the town's inhabitants which was critical to the similar determination reached by the Court in that case. And, conversely, it was the availability of effective alternative forums which led to the contrary result in *Babcock & Wilcox*.[31]

The court below properly concluded that Petitioners had available here an effective alternative channel of communication: the safe public sidewalk located within view of those frequenting Respondent's store (App. to Pet. for Cert., p. 21a). It also properly concluded that there was a countervailing significant claim which could be made on behalf of Respondent for protection of its normal business operation: "obstruction of customers using store entrances is present here but not in [*Logan Valley* and *Marsh*]" (App. to Pet. for Cert., p. 15a). The balance the court struck was, therefore, an appropriate one which should not now be disturbed.

[30] *Marsh* v. *Alabama*, 326 U.S. 501.

[31] *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105.

II

THE DECISION OF THE COURT BELOW WAS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The Petitioners have further sought to immunize their conduct from state regulation by asserting that the area here involved has been pre-empted by the National Labor Relations Act [32] and thereby withdrawn from state power. This issue, "a variant of a familiar theme," requires that the Court once again "render . . . progressively clear" that "penumbral area" in which the Act has "left much to the states." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 239-40. Its resolution, to paraphrase *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 57, "entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against [obstructive picketing which substantially interfers with the normal business use of its citizens' property]."

This "penumbral area," as recognized by *Garmon* and subsequent decisions, extends beyond regulation of that activity which is not arguably subject to either Section 7 or 8 of the Act. The pre-emption doctrine also has "due regard for the presuppositions of our embracing federal system," [33] and, accordingly, "has never been rigidly applied to cases *where it could not fairly be inferred that Congress intended exclusive jurisdiction to be with the NLRB.*" [34] The recognized

[32] 61 Stat. 316, 29 U.S.C. § 141 *et seq.* (hereafter referred to as the "Act").

[33] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 243.

[34] *Vaca* v. *Sipes*, 386 U.S. 171, 179 (emphasis supplied).

area in which "this Court has refused to hold state remedies pre-empted" thus includes state regulation where either "the activity regulated was a merely peripheral concern of the . . . Act," or alternatively, as clearly indicated by *Garmon*,[35] was a distinct, separate criterion, where the activity "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] . . . could not infer that Congress has deprived the States of the power to act." *Vaca* v. *Sipes*, 386 U.S. at 180, and cases cited therein.

The pertinent inquiries in the instant case are, therefore, these: (1) did Congress intend that the Act should have regulatory pervasiveness over conduct which obstructs the normal business use of private property; (2) is such conduct remediable under the Act rather than an activity which is "a merely peripheral concern" of the Act; (3) is such conduct dissimilar from other matters of compelling state interest, such as imminent threats to the public order, mass picketing, unremedied libels and similar activities; and (4) will the assertion of state power in this area "entail a real danger of upsetting a federal regulatory scheme."[36]

Each of these questions, the Federation submits, must be answered in the negative. The main thrust of the *amicus* position is that when, as the result of picketing, significant interference occurs with the normal business use of private property so as to remove such picketing from the protection of the First Amend-

[35] 359 U.S. at 244, and also recognized as a separate test in *Linn* v. *United Plant Guard Workers*, 383 U.S. at 62-63.

[36] *Amicus* Brief of the NLRB, pp. 16-18.

ment, the activity then becomes a matter of overriding state concern which must necessarily be subject to the regulation of its courts. It is immaterial in such case what may be the cause of such interference; regardless of whether the interference results from disruptions on the selling floor, the blocking of automobiles entering the parking lot, the prevention of customers' ingress or egress or the assemblage of large groups of pickets in such a location as to preclude normal business activities, the conduct is a legitimate subject for the exercise of state jurisdiction.

First, the displacement of state power in such a case would create a regulatory vacuum. The picketing here involved is not "conduct which is the subject of national regulation." The site chosen by a union to engage in primary picketing to protest the labor policies of a particular establishment is not a matter which is governed by Section 8 of the Act. Neither is the site chosen by non-labor pickets to engage in primary picketing to protest the quality or price of the merchandise sold, or the credit or employment policies followed, by that establishment. Yet, if in the latter context unreasonable interruption with business operations results from the picketing, the states would be empowered to fashion an appropriate remedy, whereas in the former case, if Petitioners' pre-emption contention is accepted, the states would be powerless to act. As in *International Association of Machinists* v. *Wisconsin*, 336 U.S. 618, 620, "[s]uch a desirable result, on the remote possibility of some entanglement with the Board's enforcement of the national labor policy, [should] require quite a more compelling indication of congressional

Algoma Plywood & Veneer Co. v. *Wisconsin*, 336 U.S. at 241.

will than can be found in the interstices of the Act."

Second, since the Petitioners conduct here involved was not subject to regulation by the Board at the instance of Respondent, the alternative to the exercise of state power is self-help and a concomitant imminent threat to the public order. It was this consideration which caused the court below to assert jurisdiction and, as noted by the court, which had previously motivated other state courts to similarly act. (App. to Pet. for Cert., pps. 15a-21a.) The situation is thus the same as that noted by this Court in *Linn* with respect to otherwise unremediable libel suits:

> "... ...the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized." (383 U.S. at 64, n. 6.)

The Court, therefore, concluded, as it should here, that the states' concern was "so deeply rooted in local feeling and responsibility" that it fits within the exception specifically carved out by *Garmon*. (p. 62.)

Third, the states have traditionally been permitted to take appropriate remediable action in labor picketing cases where the matter involved is one of "genuine local concern" such as "mass picketing, violence, and threats of violence."[20] They have also been allowed to

[20] E.g., *Hood v. Stafford*, 214 Tenn. 651, 383 S.W. 2d 760 (1964); *People v. Gadale*, 21 Ill. 2d 603, 174 N.E. 2d 387 (1961); and *Marshall Coop. v. Retail Store Employees Union*, 16 Wis. 2d 160, 114 N.W. 2d 376 (1962).

[21] *Auto Workers v. Wisconsin Employment Relations Board*, 351 U.S. 266.

"grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order . . . [and have been] allowed . . . to enjoin such conduct." [40] In each of these cases, as well as *Linn* and *Vaca*, the state assertion of power involved an underlying labor dispute which, in a different guise, could well have been within the ambit of the Act. That fact alone, however, was not there deemed determinative; nor should it be here.[41] The state courts clearly have sufficient expertise to solve the problem at hand.[42] And such state action would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy.[43] As this Court observed in *Hanna Mining Co.* v. *District 2, MEBA*, 382 U.S. 181, 191, n. 13: ". . . sometimes offensive conduct may be restrained by a state remedy that has no impact at all on related activity arguably within the Board's exclusive province."

[40] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at page 247.

[41] The Board's *amicus* brief argues that the Board could be called upon to adjudicate the rights of Petitioners to engage in the picketing here involved (pp. 6-10). But the Board may similarly also be called upon, in a case involving mass picketing or violence on a picket line, to adjudicate the merits of that controversy, either in reaching a determination as to whether such conduct contravenes one of the prohibitions of Section 8 of the Act, or in determining whether the pickets' conduct is such as to bar their subsequent reemployment (*Thayer, Inc.*, 125 NLRB 222). The possibility of concurrent jurisdiction, therefore, is not sufficient in and of itself to oust state jurisdiction. *See Lockridge* v. *Motor Coach Employees*, —— Idaho ——, 72 LRRM 2703 (Oct. 15, 1969).

[42] As stated by this Court in *Vaca*: "it can be doubted whether the Board brings substantially greater expertise to bear on these problems than does the courts." 386 U.S. at 171.

[43] *Linn* v. *United Plant Guard Workers*, 383 U.S. at 64.

Fourth, the Board's contention that state regulation of the Petitioner's "use of the store's *exterior* premises"[44] would upset the federal regulatory scheme is subject to the same fatal defect as the Petitioners' attempt to invoke an "openness" standard to resolve Constitutional rights. It substitutes form for substance and is thus guilty of the very practice that Petitioners criticize Respondent for—the sizing of substantial rights "by a tape measure" (Pet. Br., p. 24).

The Petitioners and the Board are not advocating here, as they suggest, a well-established principle of labor relations but instead a novel and dangerous concept. The Act may have envisaged peaceful picketing as a legitimate weapon of organized labor. But this sanction in the past has never been construed to imply a right to engage in such picketing on private property. Otherwise, there would have been no necessity, for example, to regulate "common situs" picketing[45] or to have regulated the location of the pickets in *Logan Valley*[46]; a union would be free to enter upon a construction site or the premises of Weis Market to picket wherever it desired. The law, in short, is that "if an employer barred *all* nonemployees from his premises, thereby avoiding a finding of discrimination, *and* if he was willing to give the union an employee list, . . . he [could] then prevent access to his property".[47] The reason for this rule is clear: peaceful picketing

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[44] Brief of *amicus* NLRB, p. 13 (emphasis supplied).

[45] See the cases cited at fn. 23, *supra*.

[46] See the discussion at fn. 16, *supra*.

[47] Note *Nonemployee Union Organizers Granted Access to Company Property for Solicitation Purposes*, 67 Mich. L. Rev. 573 at n. 59 (January 1969).

must be conducted at such a location as to avoid substantial interference with the normal business use of the private property involved.

Why should there be any difference then—when there has been such substantial interference—as to whether such interference occurs on the exterior or interior portions of the property? In *Logan Valley*, the Board, as *amicus*, recognized that "a state has a legitimate interest in protecting private property against trespass" and conceded that if entry had been made upon the *interior* selling area of the Weis store, the interest of the state would be "so great and the danger of interference with the federal regulatory scheme . . . so slight, that the State would not be barred from acting."[48]

The same logic is also controlling in the instant case. Surely, substantial interference with a business use as the result of picketing on exterior sidewalks affects "interests deeply rooted in local feelings and responsibilities" to the same degree as does interference which takes place on an interior sales floor. And the danger of disruption of the federal regulatory scheme as the result of state regulation in such a case is surely similarly "slight". The appropriate question, therefore,

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[48] Brief of *amicus* NLRB in *Logan Valley*, p. 17. As the Board's brief in the instant case acknowledges, Board regulation of communication may occur on both the exterior and the interior premises of an establishment. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793; *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615. *Similarly, a Marlene Industries* type remedy, such as that discussed at page 15 of the Board's brief, may provide for union access at both the interior as well as the exterior portions of an employer's premises. See, e.g., *J. P. Stevens & Co.*, 157 NLRB 869, *mod. & enf.* 380 F.2d 292 (C.A. 2, 1967), *cert. den.* 389 U.S. 1005; *H. W. Elson Bottling Co.*, 155 NLRB 714, *mod. & enf.* 379 F.2d 223 (C.A. 6, 1967).

is not where the interference occurs but whether, in fact, interference has occurred. And where it has been found to have occurred, as in the instant case, there is no pre-emption of state jurisdiction.

III

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL.,

Petitioners,

vs.

WEINACKER'S, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

The questions presented herein are:

(1) What are the correct standards to be used in accommodating pickets' right of free speech in a labor dispute with a conflicting right to the protection against interference with the retail business of the owner of the property on which the picketing is being conducted?

(2) Whether the State Court can apply the above standards to the determined facts and conclude to reasonably regulate such picketing?

(3) Whether the court below properly applied the correct standards to the physical circumstances of the instant case in concluding to regulate the picketing by limiting it to the adjacent public area?

STATEMENT OF THE CASE.

The indecipherable character of the hand-drawn diagram of Respondent's property submitted by Petitioners' (as their Appendix B to their Brief) renders it imperative for Respondent to clarify the facts to be considered by the Court. This can only be accomplished by submission of material which accurately portrays the physical circumstances of Respondent's property and the adjacent area.

Respondent concedes the absence of such material from the record below and the anoinaly presented by new matter being presented by means of Appendix. Substantial parts of the Petitioner's Statement of the Case, however, rely upon their spurious exhibit which is dehors the record and they therefore have no cause to complain of the submission of accurate, authenticated data.

The documents submitted by Respondent (which are contained in the Appendix to this Brief) are:

1. An Affidavit of Dewey West, an employee of Respondent, which accurately describes the physical circumstance of the property with an explanation of the fact that since the closing of the record below, a change in operations of the businesses on the premises has occurred in that lessees of Respondent are presently operating the retail grocery and drug business establishments on the premises (Appendix to this Brief, p. A1-A3). There are current photographs and a lease attached as Exhibits to the affidavit which are described as follows:

a. Photograph A portrays the office of Respondent presently located on the premises. (Appendix to this Brief, p. A5).

b. Photograph B portrays the public sidewalk adjacent to Government Street. The scene depicted indicates that cars entering the parking lot must slowly and carefully ne-

gotiate the narrow area available. The distance from the inside edge of the public sidewalk to the outside edge of the elevated porch in front of the Walgreens portion of the building is only 84 feet, 2 inches (Appendix to this Brief, p. A6).

c. Photograph C portrays a scene from the inside edge of the public sidewalk adjacent to Government Street across the parking lot depicting the clear visibility to the entrance into Delchamps store (Appendix to this Brief, p. A7).

d. Photograph D portrays the public sidewalk adjacent to Government Street between the Walgreens and Delchamps stores. This picture depicts the availability of a safe and adequately large public area for pickets to stand on either the double sidewalk which is 9 feet 7 inches wide or the single sidewalk which is 5 feet 7 inches wide and adjacent to a grass parking lot. Alongside the double sidewalk there is an indented entrance area where the street has been widened to the place where it joins the curb at such sidewalk (Appendix to this Brief, p. A8).

e. Photograph E portrays the intersection of Catherine and Government Streets and depicts the clear visibility over the 97 foot distance from the inside edge of the public sidewalk adjacent to Government Street to the outside edge of the elvated porch in front of Delchamps (Appendix to this Brief, p. A9).

f. Document F is the lease between Respondent and Delchamps, Inc. At pp. 3-4 thereof there is described the arrangement whereby Respondent is to be compensated on a percentage basis for gross sales in excess of the minimum rental (Appendix to this Brief, p. A10-A34).

2. A small plat demonstrates the layout of the premises (Appendix to this Brief, p. A35).

3. Three city maps of Mobile, Alabama which indicate

that property of Respondent is located in a residential area, in the center of town, and not in an outlying suburban area (Appendix to this Brief, p. A36-A38).

4. A large plat of the premises clearly indicates the extent of the parking area adjacent to the store building (Appendix to this Brief, p. A39).

5. A topographic survey of Respondent's property clearly indicates the distances between the adjacent public property and the building entrances on the private property (Appendix to this Brief, p. A40).

6. A floor plan depicts the layout of the operation of Respondent (Appendix to this Brief, p. A41).

In obtaining the above listed exhibits demonstrating the true physical circumstances [illegible] December 1969, Counsel for Respondent first learned of certain changed conditions in the operation of the subject property. Respondent submits that these changes in operation have not removed the case from the Court since because Respondent still owns the property, has a place of business located on the property and has a financial interest in the operations thereof. [illegible] as more fully set forth on pages 23 to 25, *infra*.

SUMMARY OF ARGUMENT

The picketing by Petitioners on the privately owned property of Respondent interfered with the operation of the single retail store on the property.

The Petitioners have premised their interference on the sole basis that the property was used in connection with a retail business, with its concomitant public invitation, and therefore, they contend, the property became public and available for their exercise of free speech rights.

The Court below properly balanced the respective rights

of the parties and found that the interference with Respondent's business caused by Petitioners' picketing was unreasonable under the physical circumstances presented since an effective channel of communication was available to Petitioners by picketing on the adjacent public sidewalk.

The Court below reasonably regulated the Petitioners' conduct by removing them to the proximate public sidewalk in accordance with the valid trespass laws of the State of Alabama.

Since the Alabama Court applied the standards propounded by this Court in reaching its unassailable conclusion as to the balance of rights in favor of Respondent, its judgment should prevail.

Jurisdiction of the Alabama Court is necessary in order to provide any relief whatsoever since there is no provision in the National Labor Relations Act by which the National Labor Relations Board is authorized to act to protect Respondent's valid rights.

The necessity of granting relief to Respondent herein involves a substantial concern of the state in protecting its citizens against the violence which could readily follow the exercise of self help.

The action of the Court below will not disturb any national policy of labor relations.

ARGUMENT

I A REGULATION OF FREE SPEECH WHICH DOES NOT ELIMINATE THE COMMUNICATION OF INFORMATION IS PROPER TO PROTECT A LAWFUL BUSINESS OPERATION

A The Court Is Confronted With Conflicting Constitutional Rights To Be Balanced Against Each Other.

Petitioners are claiming that their constitutional right to free speech grants them license to picket on the private parking lot and private access sidewalk adjacent to Respondent's store. Respondent counters that the picketing would substantially interfere with its right to preserve its property for the use to which it has been lawfully put, which also is a protected right under the Constitution. Thus, the Court is presented with a diametrically conflicting constitutionally protected right being asserted by each of the adverse parties.

This is not a case of first impression insofar as the legal principles involved since this Court has had considerable experience deciding conflicts between constitutional rights.

1. U.S. Const. Amends. I and XIV.
2. U.S. Const. Amends. V and XIV.

For example in *Breard v. Alexandria*, 341 U.S. 622 (1951), the constitutionally protected right of freedom of speech came into direct conflict with the right of the individual to be secure in his home. This Court decided in favor of the latter right and upheld the constitutionality of a state statute which banned solicitors from invading the premises of the individual homeowner without his permission or invitation. The Court stated:

> "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. *Rights other than those of the advocates are involved.* By adjustment of the rights we can have both full liberty of expression and an orderly life." (Emphasis added.) 341 U.S. at 644.

and has developed an approach to resolution of such conflicts.

First, it is clear that both the exercise of the right asserted by Petitioners and that asserted by Respondent may be reasonably regulated for the purpose of preserving the right of the other. Neither right is absolute. Time and again, First Amendment rights have been regulated to protect the rights of the public or private [illegible]

Similarly, the right [illegible] individual freedom with the police power of the State, we concluded that in certain circumstances individual constitutional rights must give way to overriding considerations of public safety. In *Jacobson v. Massachusetts*, [illegible] proper for a physician to stop and treat a person who, the others would not have had [illegible] a crime. And in *Prince v. Massachusetts*, [illegible] the Court ruled that the State could prohibit [illegible] distributing literature on public sidewalks.

In *Watts v. United States*, [illegible] statute making it a crime to make a threat against the President did not amount to an unconstitutional restriction of freedom of speech. It has also been held that a State may [illegible] prohibit the burning of draft cards in violation of [illegible] policies. *United States v. O'Brien*, [illegible]. And this Court has held that the right of freedom of speech does not prevent the government from outlawing the distribution of [illegible] action by the forceful overthrow of the government. *United States v. [illegible]*, [illegible] U. S. [illegible] and that a statute could prohibit [illegible] which prohibited [illegible] unreasonable, obscene, with the purpose of [illegible] arts, courts sometimes [illegible] [illegible].

The Court sustained the [illegible] requiring the issuance of [illegible] of a parade in *Cox v. New Hampshire*, [illegible] in *Kovacs v. Cooper*, [illegible] sections under a local ordinance which prohibited the use of sound trucks on the streets in [illegible] U. S. 11 (1905), the Court held that the [illegible] ing disease was sufficient to [illegible] compulsory vaccination. [illegible] Sunday closing laws [illegible] beliefs required them to close [illegible] *Braunfeld v. Brown*, [illegible] U. S. [illegible].

within their domain, which is being attacked by Petitioners in this Court.[10]

In *Marshall Field & Co.* v. *N.L.R.B.*, 200 F. 2d 375 (C. A. 7, 1952)[11] the Court decided on the particular facts of that case that it was entirely proper to exclude solicitation from public non-selling areas of the retail store, such as waiting rooms, rest rooms, elevators and corridors. The decision followed the precise formula which we advance as being determinative here. The Court found that since the presence of solicitors would interfere with the conduct of the employer's business and no unique problems of communi-

10. Although the Respondent was afforded full opportunity, in accordance with the applicable statutes, to file counter-affidavits challenging the Petitioner's evidence it chose not to do so. See, Title 7, sections 1055 and 1061, Code of Alabama (1958). Having failed to meet this minimal prerequisite, Petitioner is hardly in a position to challenge the findings of the lower court at this late date. Rather, it is manifest that this Court must give the lower court's findings the same deference on appeal as the Alabama Supreme Court was required to give to them under Alabama law. Since under Alabama law the lower court's findings were not subject to *de novo* review by the Alabama Supreme Court, it is manifest that such review may not be made here in the Supreme Court. *Town* v. *Burgess*, 208 Ala. 35, 93 So. 850 (1922); *Daniel* v. *Birmingham Dental Mfg. Co.*, 207 Ala. 659, 93 So. 652 (1922); *D. B. Clayton & Associates* v. *McNaughton*, 279 Ala. 159, 182 So. 2d 780 (1966).

The Alabama Code provides that preliminary injunction proceedings be submitted upon the pleadings and the affidavits of the parties. Section 1055 specifically permits the filing of counter-affidavits at the initial stage of the proceeding, and under Section 1061, Petitioners were given a second opportunity to supply counter-affidavits in connection with their motion to dissolve the injunction. Petitioners once again failed to avail themselves of this procedure to raise issues of facts but rather chose to rely upon a jurisdictional argument. As in *Logan Valley*, *infra*, p. 15 where this Court refused to consider the preemption argument raised by Petitioners because it was not properly raised initially in the lower Pennsylvania courts, Petitioners are similarly precluded here from voicing objections to the facts found by the court below having failed to do so at the appropriate time in the proceedings.

11. Cited with approval in Petitioners' brief (pp. 40-41).

cation were raised by the exclusion of the union solicitation, the employer's business interest should prevail. As the Court noted with approval:

> "The Board has approved the prohibition of union solicitation and discussion on the selling floors and *related traffic facilities* of department stores even when the employees are off duty. *May Department Stores Co.*, 59 NLRB 976. The Board pointed out in that case that solicitation in such areas *may unduly interrupt or disturb the customer-salesperson relationship with a detrimental effect upon the employer's business.*" (Emphasis supplied) *id.*, at 380.

The facts in the present case supply a more compelling basis for regulation of Petitioners' conduct than those presented in *Marshall Field, supra.* The activity of Petitioners herein was conducted by non-employees, as well as employees, whose claimed rights are susceptible to greater regulation than those of employees,[12] and the activity involved was picketing, a more significant interference than mere solicitation.[13]

Petitioners appear to rely upon the fact that their activity was conducted on the exterior portions of the Respondent's property to distinguish this case from the above quoted language in *Marshall Field.* Yet, here Petitioners do not dispute the propriety of the decision of the Court below precluding the pickets from blocking ingress and egress of customers into Respondent's store. This portion of the injunction, as Petitioners inferentially concede, is indisputably proper. Petitioners have instead carefully restricted their attack on the lower court's ruling to dispute what they claim to be non-obstructive picketing on the

12. *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956).
13. *Hughes* v. *Superior Court*, 339 U. S. 460 (1950).

exterior of the Respondent's property.[14] Petitioners thus appear to recognize that the presence of pickets either inside the store or in obstructing entrances could be properly enjoined as in *Marshall Field* because picketing in these locations would so seriously detract from the Respondent's effort to provide within a limited market space a site for the unobstructed conduct of business that an invasion thereof could be regulated.[15]

Clearly, therefore, the legal boundary of Petitioner's right to picket cannot be measured solely by the fact that Respondent has extended to the public an invitation to come upon and into its property to shop. To accept the invitee test as the sole determinative factor, as Petitioners' urge, would leave the property owner powerless to repel an invasion by pickets within the doorways or onto the sales floor of the store itself. Clearly, the line of permissible access must be assessed and drawn at the place where

14. In their brief (Pet. Br., p. 19), Petitioners argue: "Nor can the employer's bare property interest of itself justify banishment from the *exterior store grounds*" (emphasis supplied) and on p. 30 "... the injunction prohibits "trespassing upon the property of Weinacker's ... and that bars peaceful picketing anywhere on the *exterior grounds* of that property" (emphasis supplied). Likewise, the Brief of the AFL-CIO, as *amicus curiae*, states at p. 11, "But that does not mean there is an inevitable progression ... to the protection of pickets or pamphleteering *inside a store* ... and that calculus of interests does not entail a mindless extension of access for multipurpose area such as a street to an area devoted to selling."

15. See also p. 17 of Brief *Amicus Curiae* of the National Labor Relations Board in *Logan Valley, infra*, p. 15 which conceded that if entry were made on "the selling area of Weis store and disrupted its business ... the State [court by means of injunction] would not be barred from acting." Under the concepts advanced by Petitioners, drawing any permissible line would be impossible in this case because the same invitation is made to the public to come on each part of the Respondent's property. That is, those persons invited into the Weinacker store to shop were the exact persons invited onto the exterior portions to park and walk into the store, since Weinacker had exclusive possession of the entire tract in issue here.

the picketing can be said to unreasonably[16] interefere with Respondent's conduct of its business.

In the instant case, Respondent alleged, and proved, under the specific physical circumstances of its operation and property, that the conduct of Petitioners on the exterior portion of Respondent's private property had a disruptive effect.[17] It was on the basis of these physical circumstances that the picketing was regulated by moving the activity less than 100 feet away[18] from the store on the directly adjacent public sidewalks. The physical circumstances of this case, which include the character of the property, and the activity of the intruders, convinced the courts below that removal of the pickets to the public area closely adjacent to the premises was required to prevent interference with the rights of Respondent to conduct its business on its property.

Respondent does not suggest that as a matter of trespass law it can exercise absolute control over entry to its privately owned premises. Respondent recognizes that by inviting prospective customers to park and shop on its premises its historical title rights have become limited to such degree as declared by this Court. The classic claim of trespass, which does not concern actual injury and is predicated solely on the assertion of naked title, is not the grounds upon which Respondent's position rests. But, Respondent strongly urges that it does have a constitutionally guaranteed right to preserve its property for use in its lawful business, and to exclude avoidable interference

16 The interference becomes "unreasonable" upon balance against the rights of petitioner to an effective channel of communication as discussed in detail *infra*, p. 15 *et seq.*

17 Indeed, this disruptive effect was presumably intended by Petitioners who admittedly came onto the property "endeavoring to halt" the operation of Respondent. (Pet. Br. p. 5).

18 See Appendix to this Brief, pp. A6, A9, A10, A16.

therewith. This is the right of Respondent not mer
"naked title" which Respondent asserts before this Cour

C. The Constitutional Right Being Claimed by Petitioner

That Petitioners possess the right of free speech is no
disputed.[20] The concept of free speech involves the pro
tection of the right to communicate a point of view.[21] How
ever, this right to be able to freely communicate is not a
absolute right to be exercised at the unfettered discretio
of Petitioners. This Court has "vigorously and forth
rightly rejected" the faulty premise that "people who wan
to propagandize protests or views have a constitutiona
right to do so whenever, however and wherever the
please."[22] The Court below following the appropriat
premise, merely regulated the Petitioners' right in a rea
sonable manner, without requiring Petitioners' ability t
freely communicate its message in order to preserve the
equally protected Constitutional right of Respondent.[23]

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[20] The proposition challenged by Respondent is not that
their protection of the property of Respondent was requested
protection was required. The issue is whether Petitioners
Appellants by entering upon the property of Respondent
of Respondent by entering upon the property of Respondent
Petitioners' personal property on the property of Respondent

[21] Quotation omitted. See Lloyd Corp. v. Tanner, 407 U.S.
Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Schneider v.
with approval the holding of Marsh v. Alabama, 326 U.S. 501
1968) all property rights were subordinated to the First Amend
even though the property owned was open to the public. Id. at
Petitioners' Brief, pp. 11-12. Petitioners argue that the Court
that the shopping center could not exclude persons who wished
Petitioners' Brief, p. 12. Petitioners misconstrue the opinion of
Court of the Supreme Court of California, 23 Cal. 3d 899, 907
Respondent's property was open to the public, but that the
court below.

D. The Criteria To Be Applied in Balancing the Conflicting Rights Involved in the Instant Case.

In its decision in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), an accommodation was reached on the facts of that case between the conflicting rights involved. The Court did not grant a license for private property picketing as Petitioners contend. Rather, the Court balanced the conflicting rights and reached an accommodation on the facts of that case.

First, in analyzing the rights claimed by the picket, the Court made a detailed review of the physical circumstances of the Logan Valley Shopping Center to determine the effect of the picket's exclusion therefrom on their channels of communication.

izers were denied access rights on the private road and parking lot, serving a manufacturing plant, for the purpose of disseminating information concerning organizational rights to plant employees. Again, as in *Marsh* before and *Logan Valley* following, the Court concerned itself with reviewing the available channels of communication. Finding that there were other means of communication readily available to the organizers, the Court held it was unnecessary to disturb the Company's property rights in reaching an accommodation between the conflicting rights involved.

The Court stated at page 112:

> "It is our judgment, however, that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the Union through other available channels of communication will enable it to reach the employees with its message . . ."

E. The Balance Struck by the Court Below upon Analysis of the Physical Circumstances Was Proper.

The Court below properly applied the principles of *Logan Valley*, *Marsh* and *Babcock & Wilcox Co.* In striking a balance of the respective rights of the parties, the Court regarded as determinative the fact that effective channels of communication were otherwise available to the Petitioners if the picketing on the property was enjoined; conversely, it recognized ~~the~~ serious detriment to the Respondent's use of the property if the picketing on the property was not enjoined.

An analysis of the facts relied upon by the Court fully supports its conclusion that in the instant case, unlike *Logan Valley*, removal of the pickets to the perimeter would not seriously impair the channels of communication while a

failure to do so would seriously impair [illegible] ness operation.

The property here involved was a sin store with adjacent private parking facil operation covers approximately one-tent the Logan Valley Shopping Center.[25]

The entrances to the store building fac Street, which is to the south. On the nort ment Street and directly adjacent to Re erty are safe and commodious public side 5 feet, 7 inches to 9 feet, 7 inches in w parkways alongside the former portions walks are only 84 to 97 feet from the ste therefore signs displayed on the sidewalk a to people at the store entrance.[26] Vehicle street into the relatively narrow parking the store and must first carefully cross the

These physical circumstances of this c the case with which Petitioners could co employees and customers of Respondent fr safe, public sidewalk. Curiously, Petitio this factor, the effectiveness of picketing o public property, is "irrelevant." (Pet. B statement tacitly admits that Petitioners license to obtain access to Respondent's p solely because the property is incident to a ment serving the public. It also explains Pet to present any proof in the Court below establish any need for access to Respo property for its communication purposes, it is clear that for numerous reason

25. Calculated from the respective perime one-third of a mile here contrasted to 1.1 miles

26. Appendix to this Brief, pp. A6 to A9. A

under exclusion of the pickets from the private property would not impair the direct channel of communication to the Respondent's patrons and suppliers.

1. The proximity of the public area to the Respondent's front door permitted the pickets' signs to be clear to patrons entering or leaving the store. In *Logan Valley* on the other hand, the public area was so distant that the Court found it significant to comment that "thus the placards bearing the message must be read at a distance so great as to render them virtually undecipherable."

2. Cars approaching Respondent's property must stop (or slow down, at the least) to cross the public sidewalk before slowly maneuvering into the limited parking area. In *Logan Valley*, on the other hand, the autos could speedily proceed from a public highway across shorter terms, without crossing any pedestrian walk, into a substantially larger parking lot.

3. Here there is no danger from traffic to the pickets on the large public sidewalk or adjacent parkway. In *Logan Valley* on the other hand, the Court stated: "the pickets are placed in some danger by being forced to walk along heavily travelled roads along which traffic moves constantly at rates of speed varying from moderate to high." *Id.* at 322.

4. With only one entry on Respondent's property at the time of the picketing, there was no confusion as to which business was the object of the pickets' message. In *Logan Valley* on the other hand, the Court observed: "Finally, the requirement that the picketing take place outside the shopping center renders it very difficult for petitioners to limit its effect to Weis only." *Id.* at 320, n.10.

The salient difference between the factual circumstances in the instant case and those of *Logan Valley* do not make the principles of the latter case inapposite. Rather, they demonstrate that in applying the principles of that case, as well as those of *Marsh* and *Babcock & Wilcox Co.*, to the facts in this case, a different balance is struck.

Denial of access to the private property in the instant case clearly does not deprive Petitioners of their effective direct channels of communication at the situs of Respondent's store.

The other side of the balance—the significant interference with Respondent's use of its property which would have been occasioned if the pickets were allowed—is an equally distinguishable characteristic of this case from *Logan Valley*. Foremost was the probability of physical interference with the conduct of Respondent's business by the presence of pickets on the limited area here available for business purposes. It is almost inevitable that on a small lot pickets will impede entry, usurp the parking area or disrupt vehicle or pedestrian traffic. Under these circumstances, the prospects that such interference will cause an obstruction or escalate into a prospective breach of the peace,[27] thereby seriously interfering with Respondent's business operation, are eminently possible.

27. As found by the Alabama Supreme Court (Appendix A pp. 15a-16a):

> "It is true that the evidence does not show that a blow has been struck or any blood shed, and by some standards the trespass or picketing may be described perhaps correctly as peaceful. The obstruction of a person's use of an entrance to a building *by the presence of another person*, however, can be accomplished only by using, or threatening to use, physical force in some degree, large or small, depending on the restraint with which the persons involved govern their actions. Such obstruction can easily and quickly escalate into an affray which, even in the loose meaning of today's popular speech, cannot be properly called a peaceful affair." (Emphasis supplied.)

Indeed, the Court below specifically found the presence of the pickets to be obstructive to the conduct of the business. The Alabama Supreme Court stated as an unchallenged trial court finding (Appendix A, page 11a): "... this picketing . . . has been carried on in such a manner as to obstruct the customers of Complainant (Respondent) in entering and leaving the entrances. . . ." And Petitioners have admitted that "in this case as in *Logan Valley*, obstructive picketing, if any existed, would entitle a State court "to limit the location and manner of the picketing . . ." (Pet. Br. p. 29).

It is apparent, as it was to the Court below, that a substantially greater interference is caused by the presence of persons who have not come to shop with the business of a single store on a small lot as contrasted to the diffused, less measurable effect of such intrusion on the sidewalk of a business block as in *Marsh*, or a large shopping center as in *Logan Valley*. In addition, the Respondent's property has not been dedicated to public use to the extent of the private property involved in *Marsh* or *Logan Valley*. In *Marsh*[28] and *Logan Valley*,[29] the private property was utilized in part as a public thoroughfare. In the instant case, all of the Respondent's private property was used exclu-

28. In describing the business block in *Marsh*, the Court stated: "... residents ... make use of a company owned paved street and sidewalk ... in order to enter and leave the stores and the post office .... There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there."

29. In *Logan Valley* the Court declared the property to be quasi-public because, "Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal business district."

sively in connection with the operation of its business[30] and therefore stranger use has a far more direct impact of creating a diversion from its business purpose.

In balancing the respective rights of the parties in accordance with the precepts established by this Court, the reasonable conclusion that the Court below reached from the facts is that Petitioners' picketing should be confined to the proximate public area directly adjacent to the Respondent's premises. There is no just reason to disturb this finding.

This is not the compelling case to strain the precedent in *Logan Valley* and produce an unjust result and bad law. There has been no showing by Petitioners of a need for a channel of communication. There has been a showing by Respondents of a substantial infringement with its right to conduct its lawful business. Affirming the issuance of the injunction, therefore, would preserve the Constitutional right of Respondent to conduct its business free from interference without any impairment of Petitioners' Constitutional right of communication. A contrary result would grant a license for any claim of First Amendment rights to prevail over valuable Fifth Amendment rights in virtually every factual context.

F. The Changed Circumstances Do Not Eliminate Respondent's Need for the Injunction Issued by the Court Below.

At the time of the proceedings below, Respondent conducted the entire retail grocery and drug store operation on its premises. Subsequently, as shown in the Exhibits in the Appendix to this Brief (particularly pp. A1 to A3 and exhibits thereto), these premises were leased by

30. As the Alabama Supreme Court found:

"The premises of the instant complainant are not shown to have acquired the character of a town or business block as in Marsh. . . ."

Respondent to two separate companies, Delchamps, Inc. and Walgreen's Inc., which separately operate the grocery and drug store respectively. Respondent has continued its ownership of the premises and maintains an office on the premises (Appendix to this Brief, p. A5).

Respondent asserts for the following reasons that a viable controversy still exists with Petitioners and that therefore the relief granted below is necessary to preserve its valuable rights and, accordingly, the judgment below should not be vacated.

First, Respondent continues to be physically located on the premises so that a recurrence of the picketing could be reasonably anticipated if the injunction below were dissolved. A case is not moot where conduct initially complained of is likely to recur or where the underlying questions presented to the court below persist. *Carroll v. President and Commissioners of Princess Anne*, 393 U. S. 175, 179 (1968).

Second, Respondent, as owner, has convenanted by lease with its tenants to keep the tenants in quiet enjoyment of the premises, as shown in page 2 of the lease with Delchamps, Inc. in Appendix to this Brief (p. A12). Therefore, Respondent has contracted the legal obligation to maintain the property free of interference with the tenants' possession. The potential recurrence of Petitioners' uninvited intrusion onto the property necessitates the injunction of the Court below to insure Respondent's performance of this covenant.

Third, Respondent has a direct pecuniary interest in the unobstructed use of the property by its tenants. The terms of the said leases provide for an additional rental to be paid to Respondent after the tenants reach a certain dollar amount of annual gross sales volume (Appendix to this Brief, pp. A13 to A14). The interference with the ten-

ants' conduct of business which can be reasonably foreseen from the presence of pickets on the premises, as had occurred previously, would undoubtedly cause a loss of sales revenue for the tenant and, accordingly, would cause a loss of rental income to Respondent.

Finally, the substantial legal issues between the parties hereto, as argued herein, have not been settled by the above change in circumstances.

II. THE NATIONAL LABOR RELATIONS ACT HAS NOT DISPLACED STATE COURT JURISIDICTION ESSENTIAL TO PRESERVE RESPONDENT'S RIGHT TO THE LAWFUL USE OF ITS PROPERTY AND THE UNINTERRUPTED CONDUCT OF ITS LAWFUL BUSINESS

A. Concurrent State Court Jurisdiction in This Area Would Not Interfere With a National Policy.

The exercise of traditional state power to regulate the conduct of its residents and to provide protection of their property interests, in the context of this case, does not interfere with any national policy of labor relations. Neither the labor relationship of Petitioners and Respondent nor any national labor policy are involved in the present controversy. The instant case is one which concerns conflicting Constitutional rights.

It is the province of this Court and not the National Labor Relations Board to interpret and enforce constitutional rights. Congress did not, indeed it could not, delegate a determination of claims involving conflicting Constitutional rights exclusively to the Board. Decisions of this Court, in this case, in *Logan Valley*, in *Marsh* and other cases in this area have enunciated the standards to be applied in reaching decisions in these matters. The subsequent determinations of the critical facts in any given cause to which such standards must be applied are particularly within the province of a local court and certainly

within any special expertise of the National Labor Relations Board. It cannot be reasonably concluded therefore that Congress intended that the Board usurp State responsibility for regulating the use of property, and the conduct of residents within its jurisdiction.

In *Linn v. Plant Guards Local 111*, 383 U. S. 53 (1966), the Court considered the effect on national labor policy of the recognition of a legitimate state interest in providing redress to an injured party for a libel. Although concurrent state jurisdiction was allowed, this Court eliminated any possible disparity of decisions among the states by promulgation of its own limitation on the availability of any state remedy. The Court held: "We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 383 U. S. at 64-65.

Similarly, the decision in *Vaca v. Sipes*, 386 U. S. 171, (1967) allowed state court jurisdiction of an individual cause of action for a union's breach of its duty of fair representation even though the cause arose out of federal labor law and already had been decided by the Board also to constitute an unfair labor practice. *Local 12, United Rubber Workers v. N. L. R. B.*, 368 F. 2d 12 (C. A. Five, 1966).

B. The Controversy Involved Activity Which Is Merely a "Peripheral Concern" of the Act.

In *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236 (1959), the Court set forth the rules for determination of the existence of exclusive Federal jurisdiction of the National Labor Relations Act[1] over disputes arising out of labor relations. Justice Frankfurter stated:

[1] National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Section 121, *et seq.*, hereinafter referred to as the "Act".

> "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the state from acting. . . . When it is clear or may be fairly assumed that the activities which a state purports to regulate are prohibited by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the Federal enactment requires that state jurisdiction must yield." (pp. 243-244.)

The general rule then is that when conduct is "arguably regulated" by the Act, either protected under Section 7 or banned under Section 8, the states, as well as the federal courts, must defer to the exclusive competence of the National Labor Relations Board.

Petitioners declare that the issues involved in this proceeding fall within the general rule that the Alabama courts are preempted simply because they allege that primary picketing in support of a labor strike is "within the heartland of statutory protection" (Pet. Br., p. 36) and therefore arguably regulated by the Act.[32]

The fact is, however, that Congress, indeed the Federal

[32] Petitioners base their entire claim of preemption upon Section 7 of the Act which protects "concerted activities for the purpose of . . . mutual aid or protection. . . ." This is the sole justification advanced for the claim that the subject of primary picketing in support of an economic strike is within the embrace of the Act. They no doubt base this view on the dissenting opinion of Justice Harlan in *Logan Valley* which states that "from our past decisions [it seems clear] that the petitioner has a substantial preemption claim." The decisions cited in support of this position are distinguishable, however, on the basis that in each instance the Board sought relief on behalf of employees or unions against a property owner for interference with access to property, *which interference of the property owner was allegedly violative of the Act*. There are no cases in which the Board granted relief to the property owner for unlawful interference with his property rights because the Board has no authority under the Act to grant such relief.

Government[33] is powerless to regulate peaceful primary picketing in support of an economic strike such as is involved in this case, which is a condition Petitioners tacitly admit (Pet. Bf., pp. 35-36).[34]

The absence of any authority of the Board to grant relief where appropriate, coupled with Petitioners' claim of preemption, would leave Respondent without any procedure or forum available for the assertion of his lawful rights.

For purposes of illustration of this unreasonable result, assume stranger picketing occurred in the employee's parking lot of the *Babcock & Wilcox Co.*, an area already determined by the Court to be off-limits to such pickets (*supra*, pp. 17-18). There is no provision in the Act which would outlaw the conduct; Respondent could obtain no relief from the Board in such case. In fact, as Petitioners contend in their argument this picketing would constitute "concerted

33. Norris-LaGuardia Act, 47 Stat. 70; 29 U. S. C. 101-115.

34. *Cf. Organizing and The Law*, A Handbook For Union Organizers, by Stephen I. Schlossberg, General Counsel, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), 1967, at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does *so without the protection of the Labor Act*. The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. *There is, however, no section of the Taft-Hartley Act available to the employer in this situation.*" (Emphasis supplied.)

The "exceptional circumstances" referred to by Mr. Schlossberg included entry on shopping center property, where, under the facts of the case, entry would be authorized. Although the *Logan Valley* case arose after Mr. Schlossberg's handbook had been written, it presented an example of such an exceptional circumstance. *Logan Valley* by reason of the facts of the communications problem inherent in exclusion, coupled with the lack of any interference by picketing with the business operation and use of the property, rendered it necessary to allow the organizer to lawfully come onto the premises.

activities for the purpose of the mutual aid or protection", the generally defined protected activity. Then, even though this Court had already found the place of the picketing to be improper, upon application of the preemption doctrine urged by Petitioners, the courts would be powerless to remedy the situation. In what way could the judicially determined right of the property owner be protected?

The possibility of this obviously undesirable result was noted by the Illinois Supreme Court in *People v. Godutty*, 121 Ill. 2d 605, cert. den. 368 U. S. 927 (1961): "In [Babcock & Wilcox Co.] . . . the Court recognizes the property interest of the employer to be superior to the interest of the Union in having a convenient means of communicating with employees. The notice or order of the employer is of little consequence, however, if it cannot be enforced." The Court therein upheld a conviction of criminal trespass.

In factual circumstance, as presented herein, where there is no remedy provided in the Act for an injury, an exception to the general rule in *Garmon* must be applied. This exception as stated by Justice Frankfurter is:

> "However, due regard for the pre-suppositions of our embracing federal system, including the principle of diffusion of power, not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate *when the activity regulated was a merely peripheral concern of the National Labor Relations Act.*" (Emphasis supplied.)

The unavailability of any Board remedy is a cogent reason for the application of this exception and accordingly the jurisdiction of the court below should not be held to have been preempted by the Act.

C. The Decision Below "Touches Interests Deeply Rooted in Local Feeling and Responsibility."

Perhaps the strongest argument against a finding that state court jurisdiction has been displaced is the nature of the protection sought below. Petitioners entered Respondent's property and picketed; this activity interfered with Respondent's conduct of its retail business. When requested to discontinue their disruptive activity, Petitioner refused. Thus confronted by an invasion of its property which threatened the continued conduct of its lawful business, Respondent applied to the state court for an injunction. No other court or agency had the authority to provide such relief in this case.

The State has the primary responsibility for the protection of the property interests of its citizens through application of its valid trespass laws. In fact, state courts have historically and consistently decided controversies and provided the appropriate remedies to be afforded, whether criminal or civil, when conduct involved entry upon the property of another without consent, even though such cases involved picketing by labor unions or claims of justification based upon Constitutional guarantees.[35]

35. *People ex rel. Koester v. Rozensweig*, 171 Misc. 702, 13 N. Y. S. 2d 795 (1939); *Hotel and Restaurant Employees Local 802 v. Asimos*, 216 Ark. 694, 227 S. W. 2d 154 (1950); *Millmen Union, Local 324 v. MKT Railroad Co.*, 253 S. W. 2d 450 (Tex. Civ. App., 1952); *People v. Gabuto*, 21 Ill. 2d 605, 174 N. E. 2d 385 (1961); *cert. den.*, 368 U. S. 927; *Moreland Corp. v. Retail Store Employees Union, Local 444*, 16 Wis. 2d 499, 114 N. W. 2d 876 (1962); *Amalgamated Clothing Workers v. Wonderland Shopping Center*, 370 Mich. 547, 122 N. W. 2d 785 (1963); *Stafford v. Hood*, 213 Tenn. 684, 378 S. W. 2d 766 (1964); *Schwartz-Torrance Investment Corp. v. Bakery Workers, Local 31*, 61 Cal. 2d 766, 40 Cal. Reptr. 233, 394 P. 2d 921 (1964); *cert. den.*, 380 U. S. 906; *People v. Poe*, 236 Cal. App. 2d Supp. 928, 47 Cal. Reptr. 670 (1965); *People v. Weinberg*, 6 Mich. App. 345, 149 N. W. 2d 248 (1967); *Blue Ridge Shopping Center v. Schleininger*, 416 S. W. 2d 633 (S. Ct. Mo., July 10, 1967); and *State, v. Quinnell*, 151 N. W. 2d 598 (1967). (See also *Whittlesey v. United States*, 221 A. 2d 86 (Ct. App., D. C., 1966).

The instant controversy, therefore, squarely fits the second exception to the general rule of preemption as stated in *Garmon* that:

> "... the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress has deprived the State of the power to act."

In *Linn*, the Court applied this exception, recognizing "an overriding state interest in protecting its residents from malicious libels. ..."[36] This interest flowed from the absence of any legal remedy, if the states were preempted, in such a situation. In such a case, the probability of the exercise of self help and the possibility of such acts escalating into violence, created a serious threat to domestic peace, precisely as noted in *Linn* at page 64, note 6:

> "... the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized. ..."

In *Linn*, therefore, the Court concluded that the State's concern in providing redress for malicious libel was so "deeply rooted in local feeling and responsibility" that it fit within the exceptions specifically carved out by *Garmon*.

In *Vaca* v. *Sipes*, *supra*, this same possibility that the injured party could be left remediless upon a finding of preemption was compelling to this court in finding that Congress could not have intended to preempt the area there involved.

36. The Board already had jurisdiction over the labor dispute in *Linn*; further, as noted by the Court, if the false statements were coercive or misleading, they could have constituted an unfair labor practice under Section 8.

The authority of the States, as claimed by Petitioner, to provide a remedy for the unauthorized entry onto private property, and the absence of any Federal remedy in such a case (see pp. 25-34 *et seq. supra*), would inevitably result in the same need for, and actually resort to, self-help and the same concomitant imminent threat of violence. "The basic purpose of the [trespass] statute is the prevention of violence or threats of violence." *People v. Gadalis*, 21 Ill. 2d 605, at 609, cert. den. 368 U. S. 927 (1961). As stated in *Lyon* (at p. 82), "Intimidation and threats of violence no less than actual violence, affect such compelling state interest as to permit the exercise of state jurisdiction." A finding of exclusive Board jurisdiction, and the resulting displacement of State power, would thus result in a regulatory vacuum in the precise area closely coincident to that described in *Weber, Inc. v. Int'l. Bro. of Elec. Wkrs.*, 348 U. S. 468 (1955), *Wisconsin Emp. Rel. Bd.*, 351 U. S. 266 (1956), at pp. 274-275:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by violence and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

The preservation of the property rights claimed by Petitioner herein lies within the area of traditional state protection under its trespass laws. The protection of such rights involves "the overriding state interest . . . involved in the maintenance of domestic peace." (*Plumbers' Union v. Borden*, 373 U. S. 690, 696 (1963)).

The repose of exclusive jurisdiction in the National Labor Relations Board therefore would seriously interfere with the discharge of the State's responsibility to protect the substantive rights of its residents.

CONCLUSION

It is respectfully submitted that the Alabama Supreme Court, in a proper exercise of its jurisdiction and by application of the standards propounded by this Court to the facts before it, properly concluded that the Respondent should be protected by injunctive relief against the Petitioners' interference with its lawful use of its property.

Accordingly, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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Of Counsel.

APPENDIX.

STATE OF ALABAMA,
COUNTY OF MOBILE.

Personally appeared before me the undersigned Notary Public, in said County in said State, Dewey West, known to me, who, after first being duly sworn did depose and say as follows:

My name is Dewey West; I am Bookkeeper for Weinacker Bros. Inc., and have been such for about one and one-half years. Prior to that, I was employed by this Company for four years as Office Assistant. I was so employed when the picketing by the Retail Clerks Union, which is the subject of this suit (*Taggart, et al. v. Weinacker Bros. Inc.*, Alabama Supreme Court, First Division No. 295, Circuit Court of Mobile County, in Equity, Case Number 63,733 McC).

Since the hearing in the instant case in the Circuit Court of Mobile, Weinacker Bros., Inc., has ceased to operate a grocery and drug business; however, it retains an office in the building formerly housing its stores as is evidenced by photograph marked Exhibit A attached hereto and incorporated herein.

Weinacker Bros. Inc. continues to own the land and buildings at the location of its former grocery and drug operations and leases space therein to two entirely separate tenants, viz: Delchamps, Inc. a retail grocery store and Walgreen's Inc., a retail drug store. Since said lease to Delchamps, Inc. on or about October 21, 1966, [D. W.] I have continued to work in the office of Weinacker Bros. at the building and have had occasion to observe the

parking lot, sidewalks, signs and general exterior, including traffic conditions just as I had prior to said lease. There has been no material change since that time.

Vehicles entering the parking lot surrounding these two stores enter very slowly because of traffic conditions. I have personally stood on the sidewalk opposite the Walgreen's entrance, see Exhibit B attached hereto and opposite the Delchamps entrance, see photograph attached hereto and marked exhibit C, and observed the slow entry of cars into this parking lot. At the same time, I measured with a steel tape the distance from the inside edge of the public sidewalk to the outside edge of the elevated front porch in front of each of these entrances. The distance, when measured perpendicular from the inside edge of the public sidewalk to the outside edge of the raised cement porch at the entrance to Walgreen's Inc. was 84' 2". The distance to Delchamps' raised porch was 97', see Exhibit E attached hereto and incorporated herein. Signs in the windows of these stores were legible to me. From the sidewalk in front of Delchamps Inc. I could easily read letters which were 3¼" in height; from the sidewalk directly in front of Walgreens Inc. I could easily read letter 3¼" in height and I could also read letters which were only 2" in height on the signs they displayed on the windows. These windows were approximately 4 feet further from me when I was on the public sidewalk than the front edge of the raised porch in front of these entrances. In other words, these signs were on the store windows some four feet beyond the measured distances referred to above.

I am a person of average visibility and wear glasses both for distance and for reading.

I also measured the public sidewalk North of Government Street, between the Walgreens and Delchamps stores and Government Street. As is apparent in Exhibit D attached hereto and incorporated herein, the double sidewalk is 9' 7"

wider, whereas the single sidewalk shown thereon is 5' 7" in width. It will be observed from these exhibits there is a grass plot lying between the single sidewalk shown in Exhibit D and Government Street which I measured to be 18' wide. At the point where the double sidewalk exists, there is an indented parking or entrance area where the street has been widened to a point where it joins the curb at the double sidewalk.

While the picketing was going on, on the double public sidewalk and on the single sidewalk as shown in Exhibit D, I observed and read without any difficulty the picket signs which I was standing on the raised porch in front of the entrances of what is presently Delchamps Inc. and Walgreens Inc. The distances thereof being, respectively, 97' and 84' 2".

I am very familiar with the matters, parking lot, building and surrounding area shown in each of the attached Exhibits A-E and do hereby affirm that each is a true and accurate representation of the scene and of the buildings, parking lot and sidewalks as the same existed on December 23, 1969 and was during the proceedings involved in said case, the only change being in the names and type of store designations and of course, advertising material.

I am also attaching hereto the lease to Delchamps Inc. which is marked Exhibit F and incorporated herein which is similar to the Walgreen's lease, the chief difference between the two being that we have a building obligation under the Walgreen's lease.

Further Deponent saith, not.

s/ DEWEY WEST
Dewey West

Subscribed and sworn to before me this 23 day of December, 1969.

(SEAL)

ELLEN EDWARDS,
Notary Public, Mobile County, Alabama.

EXHIBIT A.

EXHIBIT B

EXHIBIT D.

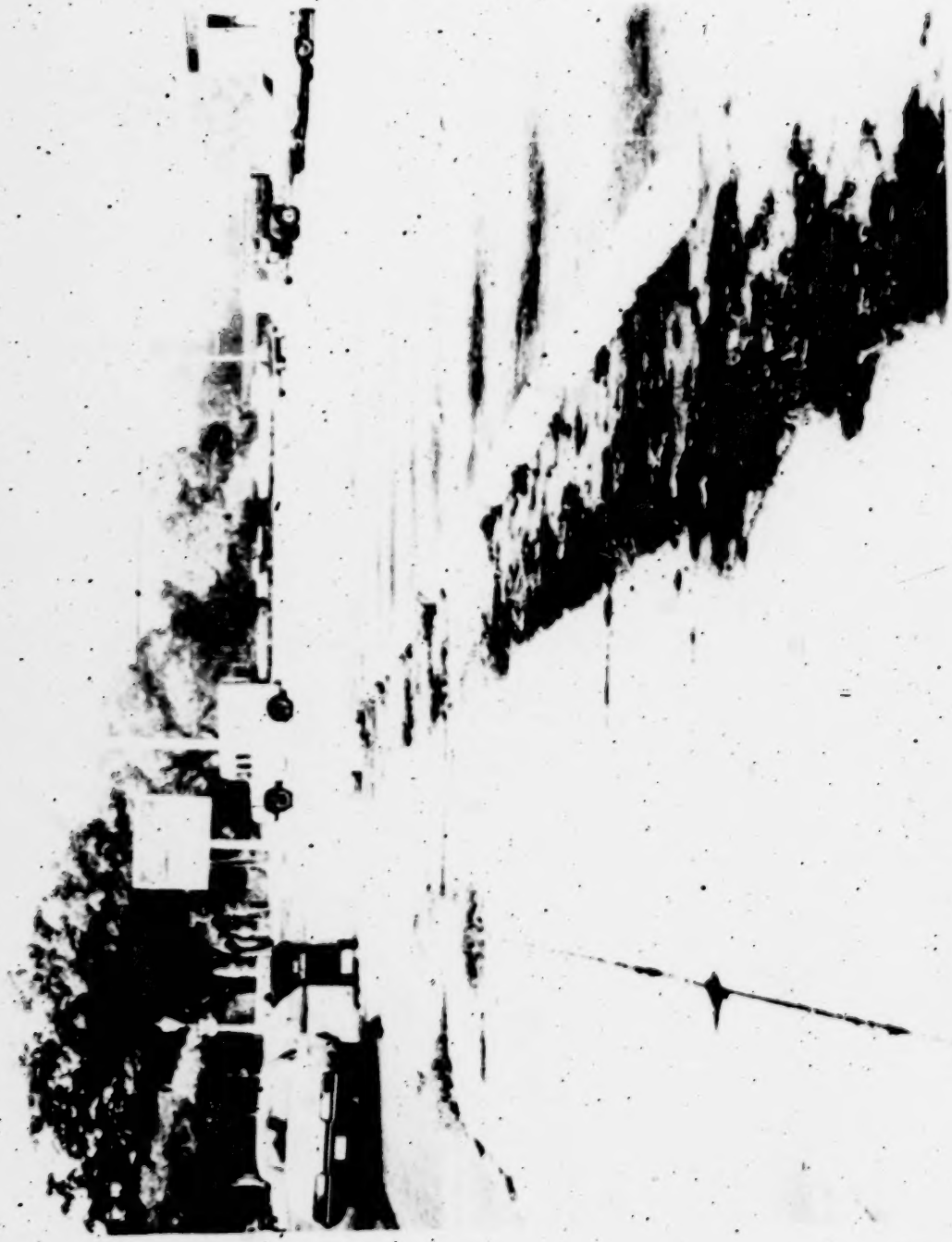

EXHIBIT E

EXHIBIT F

MOBILE ALABAMA

October 21, 1966

Weinacker Brothers, Inc.
1950 Government Street
Mobile, Alabama

Gentlemen:

Reference is made to the lease agreement dated October 21, 1966, made by you to the undersigned with respect to the grocery department situated in Weinacker's Shopping Center, located in the City of Mobile at Catherine and Government Streets, outlined in red on Exhibit "A" attached to and made a part hereof of such lease.

In connection with and as a part of this lease agreement we agree with you that so long as you remain the landlord you will cause the undersigned to be included as a named assured in the liability policy with respect to the parking area shown on Exhibit "A" attached to this lease, and we will reimburse you to the extent a prorata of such premium paid for the liability insurance covering the parking area equals the prorata parking area outlined in green on Exhibit "A" attached to this lease bears to the total parking area shown on such Exhibit "A".

Very truly yours,

DELCHAMPS, INC.

A. F. Delchamps, Jr.
Executive Vice President

ATTEST:

Secretary-Treasurer

Beginning at the Northwest corner of Catherine and Government Streets and running thence Northwardly along the West line of Catherine Street three hundred five and five-tenths (305.5) feet, more or less, to the South line of property now or formerly of Louisa Fuller, thence running Westwardly along the South line of said property of Fuller eighty-one (81)

WITNESSETH:

thence running Westwardly along a straight line two hundred sixty-eight (268) feet to a point which is three hundred fifty-four (354) feet from Government Street, thence running Southwardly along a straight line one hundred fifty-one (151) feet to a point, thence Westwardly along a straight line parallel with Government Street one hundred twenty-six feet to a point, thence Southwardly ten (10) feet to a point, thence Westwardly along a line parallel with Government Street one hundred forty-six (146) feet to the East side of Macy Street, thence Southwardly along the East side of Macy Street one hundred ninety (190) feet to the Northeast corner of Macy and Government Streets, thence running Eastwardly along the North side of Government Street four hundred fifty (450) feet, more or less, to the point of beginning.

TERM

FOR TENANT TO HAVE AND TO HOLD from the date when tenant opens the demised premises for continuous use and occupation by tenant as a Supermarket and for no other different use or purpose for and during the term of 15 years, all subject to the terms, conditions, stipulations and covenants herein contained; and landlord covenants to keep tenant in quiet possession of the demised premises during said term and any extension thereof. If tenant opens for business in the demised premises on a day other than the first day of a calendar month, then, and in that event, tenant shall pay landlord, in addition to any other rent, the fractional part of $ 1,962.50. Tenant shall not be required to open the demised premises for business, and no rent shall commence hereunder, until (a) the demised premises have been delivered to tenant completed in accordance with plans and specifications and (b) landlord has completed construction of all of the common areas shown on Exhibit "A" Delivery of the demised premises shall not be made between December 5, 1966 and January 2, 1967

Date 10-11-66

DELETED

and maintain the same in good repair and usable condition for use by the patrons of the shopping center and the tenant and their employees during the term of this lease and any extensions thereof. The arrangements and location of all store buildings and common areas (including parking area) within the shopping center shall at all times during the term of this lease, or any extensions thereof, be maintained as shown on Exhibit "A" and shall not be changed without the written consent of tenant. Landlord guarantees that there shall never be less than five (5) automobile parking spaces in the shopping center for every 1000 square feet of ground floor area of leasable buildings.

[illegible] Landlord may from time to time erect additional store buildings in the shopping center (but only in the areas reserved and designated therefor on Exhibit "A"). Landlord agrees not to erect any buildings, service stations or structures on any area designated and reserved on Exhibit "A" for parking, service areas, entranceways and ways for ingress and egress. Landlord agrees to abide by the front building setback line for the overall shopping center and to provide adequate entranceways, ways for ingress and egress and service areas, and further agrees that tenant shall have uninterrupted use and enjoyment of the entranceways, ways for ingress and egress, the parking areas and the parking areas shown on Exhibit "A" without interference with said use and enjoyment of conduct of tenant's business by [illegible] Landlord [illegible] to the shopping center or otherwise.

[illegible]

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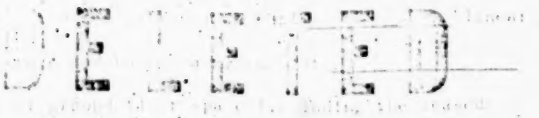
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thereof, at the option of landlord or at the option of tenant, which said option shall be exercised by notice in writing given to landlord and tenant, as the case may be, within thirty (30) days after the occurrence of such damage or destruction, this lease shall terminate and no rent shall be paid by tenant for the period subsequent to the date of such damage or destruction. If this lease shall terminate as aforesaid and any rent shall have been paid by tenant in advance, landlord agrees to refund to tenant all rent so paid applicable to the period subsequent to such damage or destruction.

If any of the buildings in the shopping center (other than the building on the leased premises) be partially or substantially destroyed by fire or other casualty and landlord fails within six (6) months after the date of such damage or destruction to begin restoration and to have completed such restoration within twelve (12) months from the date of such damage or destruction, tenant may, at its option, cancel this lease by written notification to landlord within sixty (60) days after the expiration of said six (6) month period or within sixty (60) days after the expiration of said twelve (12) month period.

Landlord and tenant shall each look solely to his own insurance in the event of destruction or damage to the property of either. Neither landlord nor tenant shall be under obligation to pay any amount to the other, its successors or assigns, or to the insurance company issuing the policy of insurance for the amount of insurance or damages even though the loss or damage is caused by the negligence of the other, its agents or employees.

If so much of the demised premises or of the remaining area within the shopping center (including the parking area) be taken by any utility or governmental authority or agency having the power to condemn or take private property as to interfere with access to or use of the demised premises or adversely affects the economics of tenant's business thereon or reduces or impairs the amount of business conducted on the leased premises, or reduces the square footage in the demised premises as much as ten (10%) per cent, then, and in either of such events, tenant may, at its option and at any time within six (6) months after such taking, by written notice to landlord, terminate this lease. Tenant, upon any taking, shall be entitled, in addition to any other damages allowed it by law, to so much of the award as will compensate it for loss of business and cost of removal of stock and stock fixtures.

Landlord, during the term of this lease, or any extension thereof, agrees to pay all real property or ad valorem taxes that may be levied or assessed against the land and improvements in the shopping center, including the demised premises and tenant agrees to pay all taxes levied or assessed against its fixtures, equipment and personal property.

Landlord agrees with tenant (and this agreement is a material consideration for the execution of this lease by tenant) that, so long as this lease is in effect (whether extended or not), landlord will not lease or permit to be leased to any other tenant any business or other building in the shopping center or any property or building which is now owned or may hereafter be owned by landlord or by a corporation or other business entity in which landlord has or may hereafter have the majority of stock or interest therein and which is located within one and one-half (1 1/2) miles radius of the shopping center, to be used or occupied by any tenant or other party for the purpose of operating a supermarket or any other store that would carry fifty (50%) per cent or more of items of a kind, style or classification that would be similar or identical to the kind, style or classification carried by tenant.

Should landlord default under the "EXCLUSIVE" section of this lease, tenant shall have the right, so long as this default shall continue, to discontinue the payment of minimum rental.

At any time after minimum rental has been discontinued for ninety (90) days, and while landlord remains in default, the tenant may cancel this lease by a thirty (30) day written notice to landlord.

SURRENDER OF PREMISES

The tenant shall, at the termination of this lease, peacefully quit, surrender and deliver up to the landlord, its successors or assigns, the leased premises in as good condition as they were on the commencement date of this lease, with the exception of usual wear and tear, fire, the elements, Act of God, civil riot, war, insurrection, or other unavoidable casualty irrespective of the cause thereof.

SIGNS

Tenant may erect signs on the exterior and interior of the demised premises. Tenant may also erect a changeable copy sign in the parking lot at a location to be approved by the Landlord. Landlord shall not permit or allow any one to erect any sign in the shopping center other than a tenant or outdoor advertising companies. Any signs installed by tenant shall be at its own expense and may be removed at the termination of this lease.

Any damage to the building as a result of the removal of tenant's signs shall be repaired at the expense of the tenant.

ATTORNEY FEES

In the event of default on the part of tenant and the employment of an attorney for the collection of any amount due hereunder, or for the institution of any suit for possession of said property, or for service incident to the breach of any other condition of this lease by tenant, or on account of bankruptcy proceedings by or against tenant, or legal process being issued against the furniture and effects of tenant, located upon the leased premises, or the leasehold interest of tenant, tenant agrees to pay and shall be taxed with a reasonable attorney's fee, which fee shall be a part of the debt evidenced and secured by this lease.

BINDING ON SUCCESSORS IN INTEREST

Every provision hereof applicable to landlord and every provision hereof applicable to tenant shall also bind, apply to and run in favor of "their respective successors in interest" as fully as if said quoted words were inserted after the words "landlord" and "tenant" wherever they appear herein, except that this provision shall not permit the assignment of the lease by tenant, or the subleasing of the premises except on the conditions herein imposed.

Landlord agrees, during the term of this lease, and extension thereof, and at its sole cost and expense, to maintain the parking area; to provide proper grade level and drainage for said parking area; to install and maintain adequate lighting facilities and time clock connected to a master electrical meter; to keep the parking area lighted, striped, clean and free from all debris and available at all times as a free parking lot for customers of the shopping center; except that tenant agrees to keep the parking area outlined in green on Exhibit "A" attached to this lease striped, clean and free from all debris so long as Weinacker Brothers, Inc., remains the landlord; this exception in nowise removing the other responsibilities of the landlord stipulated for the entire parking area. Landlord shall also keep the parking lot lights on for the entire shopping center each weekday from dusk until 10:00 P. M., but this shall not be construed as giving the landlord the right to govern the tenant's business hours.

DEFAULT BY LANDLORD

If landlord should default in any of the covenants and agreements contained in this lease, (in addition to any other rights of tenant hereunder), and provided such default is not corrected within sixty (60) days from receipt of written notice by landlord from tenant of such condition, then, and in that event, tenant at its option may (1) correct such default and deduct any and all cost as a result of such correction from rentals due or becoming due until tenant is reimbursed in full for cost of such corrections, or (2) the tenant shall have the right, so long as default shall continue, to discontinue the payment of minimum rental.

At any time after minimum rental has been discontinued for ninety (90) days, and while landlord remains in default, the tenant may cancel this lease by a thirty (30) day written notice to landlord.

Any assent, express or implied, by the tenant to any breach of any specific covenant or condition herein contained, shall not be construed as an assent or waiver of any such covenant or condition generally or of any subsequent breach

Article VII.

Landlord and tenant agree that in the event tenant defaults in payment of the monthly rental, landlord shall give tenant written notice by certified or registered mail of such default, and tenant shall have thirty (30) days from the date of receiving such notice to correct the same. If tenant fails to correct such default within said thirty (30) day period, landlord may, after giving tenant one additional fifteen (15) day notice, at its option, terminate this lease, in which event the rental for the unexpired term of this lease shall be immediately due and payable to landlord.

Landlord and tenant agree that in the event of any default by tenant in the performance of any other covenant or agreement herein contained (other than the payment of monthly rental), landlord shall give tenant written notice by certified or registered mail of such default. If, at the expiration of sixty (60) days after service of such notice such default continues to exist, or in case of a default which with due diligence cannot be cured within sixty (60) days and tenant is not proceeding with due diligence to cure and correct the same, landlord shall then give tenant a second notice in writing by certified or registered mail; and five (5) days from receipt of such second notice landlord may, at its option, terminate this lease, in which case the monthly minimum rental for the unexpired term of the lease will be due and payable to landlord immediately. In the event tenant shall correct or cure any item of default within the time provided, then upon such correction or cure, tenant's rights hereunder shall be re-established as though said default had not occurred and said notice had not been given by landlord.

during the term, or if tenant shall be evicted from said premises by summary proceedings or otherwise, or upon the happening of any event of default, landlord may, at its election, re-enter the same by force or otherwise, without being liable for prosecution therefor, and may relet said premises at any time as agent of tenant, applying any moneys collected, first, to costs, fees and expenses of collecting, then, to the expense of obtaining possession, then, to the payment of the rent and all other sums owing and to become owing landlord and paying any surplus thereof to tenant, and such re-entry and reletting shall not discharge tenant from liability for rent or from any other covenant of this lease by it to be kept and performed.

PENALTY FOR FAILURE OF LANDLORD TO MAINTAIN COMMON AREAS

If landlord fails to do anything required of it hereunder with respect to maintenance of the common areas (including the parking area), then tenant may give landlord written notice specifying what landlord has failed to do and if landlord does not commence to correct such condition within five (5) days from the receipt of such written notice, or if landlord commences to correct such condition but does not continue the prosecution thereof with diligence, then, and in either of such events, tenant may itself correct such condition and deduct the cost thereof from any rent due or to become due under this lease by tenant to landlord.

AGENCY

~~Landlord, in consideration of the services rendered by~~ DELETED ~~, its~~ agent, in making the demised premises to tenant, hereby authorizes agent to collect all rent for all sums payable hereunder during the entire term hereof, or any extension thereof, ~~and landlord hereby agrees to pay to agent, for services rendered~~

Date 10-21-11
Lessee Initial
Lessor Initial JH

any agent ... for this lease, or any extension thereof, an amount equal to _____ (_____%) per cent of all rents paid under this lease or any extended period thereof. Landlord hereby authorizes tenant to pay all rent payable hereunder direct to agent and landlord agrees with tenant that all rent payments made hereunder by tenant to agent shall be conclusively deemed to have been made by tenant to landlord. Any notice, written or otherwise, given by tenant to landlord hereunder may, at tenant's option, be given by tenant to said agent and any notice so given by tenant to said agent shall be conclusively deemed to have been given by tenant to landlord, any notice given hereunder by tenant to agent being as effective for the purpose for which given as if such notice had been given direct to landlord. Any such notice so given by tenant to agent shall relieve tenant of the necessity of giving any further notice to landlord.

Date 10-31-11
Lessee Initial
Lessor Initial

DELETED

MARGINAL NOTATION

The capitalized notations appearing on the left margin of this lease are inserted only for the convenience of the parties, the same having no legal significance whatsoever. Such marginal notations do not purport to cover or describe the entire subject matter of this lease, or of the paragraphs or sections to which they may relate.

IN WITNESS WHEREOF, landlord and tenant have hereunto set their respective hands and seals and have executed this lease, in duplicate, as of the day, month and year first hereinabove written.

By _____
As its President
LANDLORD

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)
LANDLORD

ATTEST:

_____
As its Assistant Secretary

DELCHAMPS, INC., An Alabama Corporation

By _____
As its President
TENANT

STATE OF ALABAMA:
COUNTY OF MOBILE:

I, _____, a Notary Public in and for the _____, hereby certify that Robert M. Weinacker, Jr., and Denny West, whose names as President and Secretary-Treasurer, respectively, of Weinacker Brothers, Inc., a corporation, are signed to the foregoing instrument and who are known to me, acknowledged before me on this day that, being informed of the contents of the instrument, they, as such officers and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this 21st day of October, 1966.

_____
Notary Public in and for _____

My commission expires October 21, 1967

STATE OF ALABAMA:
COUNTY OF MOBILE:

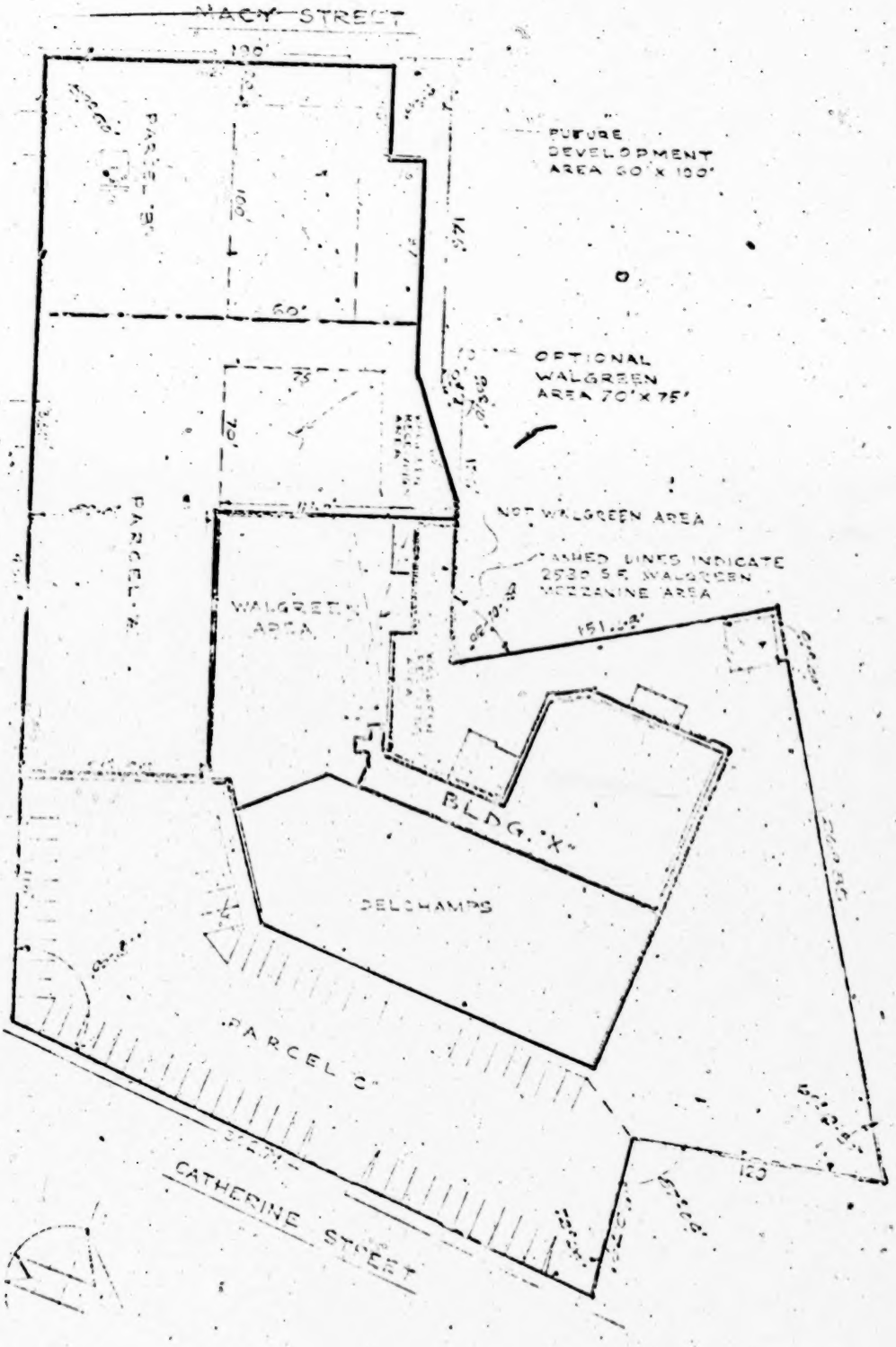
I, _____, a Notary Public in and for the _____, hereby certify that O. H. Delchamps, Sr., and O. H. Delchamps, Jr., whose names as President and Assistant Secretary, respectively, of Delchamps, Inc., a corporation, are signed to the foregoing instrument and who are known to me, acknowledged before me on this day that, being informed of the contents of the instrument, they, as such officers and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this 21st day of October, 1966.

_____
Notary Public in and for _____

My Commission Expires 2-4-68

Exhibit "A"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GRAPHIC MAP OF VOLUMES

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SPRING HILL TOULMINVILLE &
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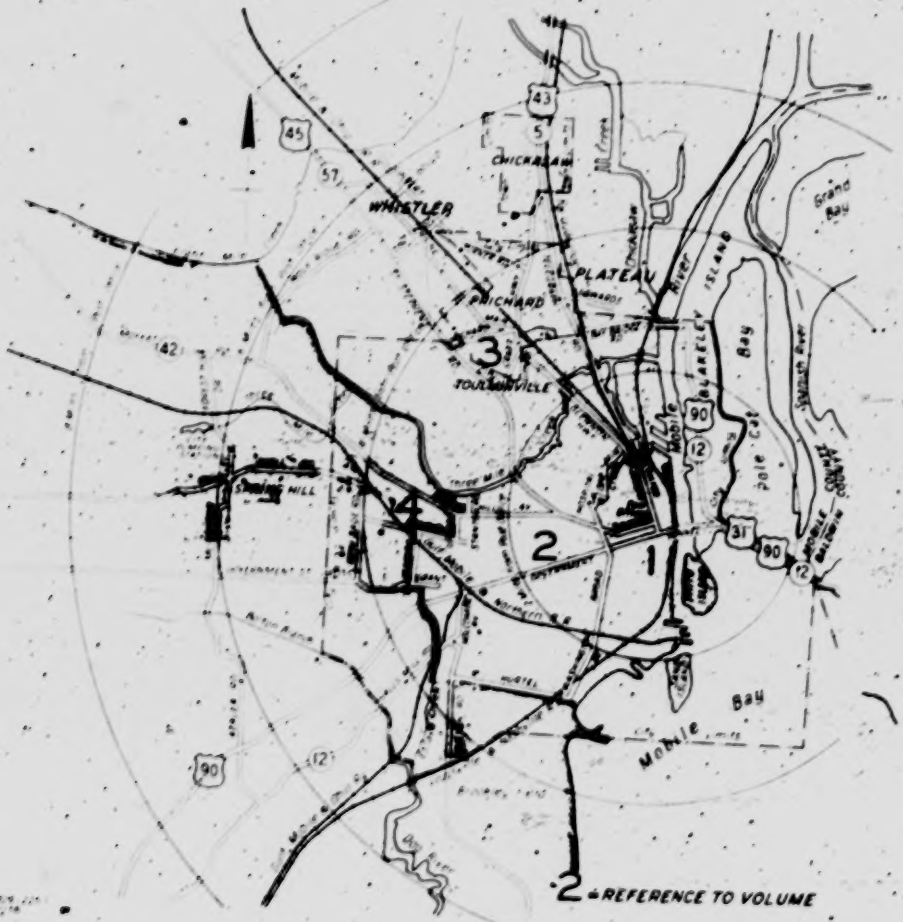

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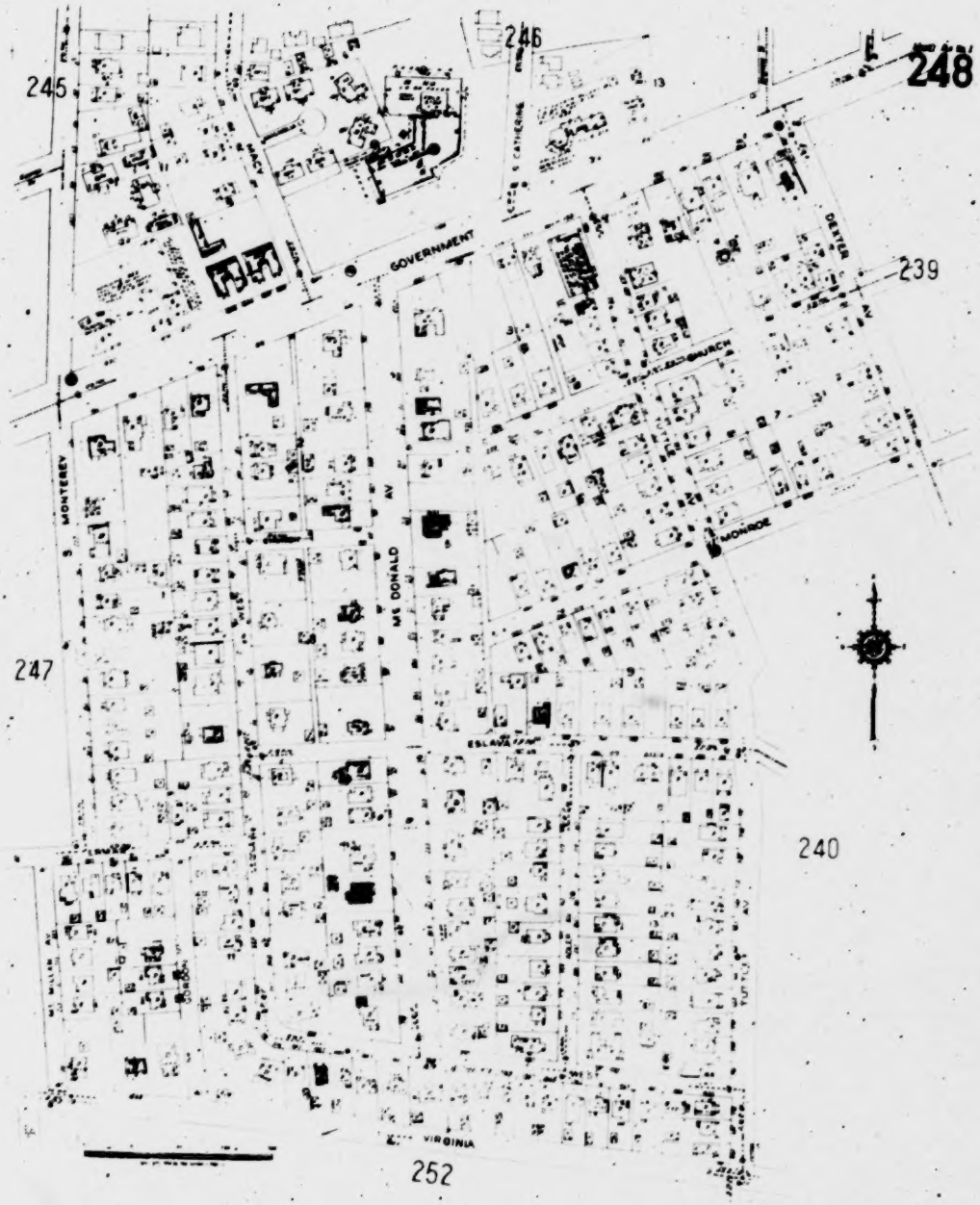
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DEC 31 1969

IN THE

Supreme Court of the United States

October Term, 1969
No. 74

CLIFFORD TAGGART, *et al.*,

Petitioners,

vs.

WEINACKER'S, INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

Motion of Homart Development Co. for Leave to File a Brief as Amicus Curiae and Brief of Homart Development Co. as Amicus Curiae.

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IN THE

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Motion of Homart Development Co. for Leave to File a Brief as Amicus Curiae.

Comes now Homart Development Co. (hereinafter called "Homart") by its attorney, Allen B. Gresham, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae* in the instant case in support of the position of the Respondent for the following reasons:

1. Homart is a Delaware corporation and is engaged in the ownership and operation of eight shopping centers throughout the United States. Homart is one of the respondents in a proceeding before the California Fourth District Court of Appeal (hereinafter referred to as the "California case")[1] which involves

[1] *Diamond, et al. v. Bland, et al.*, 4th Civ. No. 10084. The parties have jointly sought to expedite the proceeding in order to obtain a final determination by the California courts at the

(This footnote is continued on the next page)

issues related to but nevertheless distinct from those raised in the instant case. The interest of the *amicus* is that the Court should be aware of the pendency of that proceeding and not dispose of the different questions there involved. Alternatively, should the Court desire to determine such matters, Homart's concern is that the Court should be aware of the dimensions of such issues and its position with respect thereto.

2. Homart's concern is underscored by a series of generalizations and over-extensions of this Court's decision in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, engaged in by the AFL-CIO in its *amicus* brief filed herein. Acceptance of such arguments could well be dispositive of the California case adverse to Homart's interest. If permission to file an *amicus* brief is granted, Homart will briefly describe the errors contained in such arguments and the

earliest possible date. Thus, the critical event—Homart's request (under threat of arrest pursuant to a San Bernardino shopping center no-trespass ordinance) that plaintiffs cease from engaging in the solicitation of signatures on an environmental pollution initiative petition on both the common aisleways of the interior mall area and the exterior adjacent sidewalks of its shopping center, occurred on October 30, 1969. Plaintiffs' complaint, seeking a preliminary and permanent injunction to preclude such alleged interference with their Constitutional rights, was filed on November 5 and was denied, after a full hearing, by the Superior Court of San Bernardino County on November 14. An appeal was filed in the District Court of Appeal three days later and on December 10, a joint petition was made to the California Supreme Court that it transfer the case to itself for hearing and decision. This petition was denied by the court on December 12 and a request for reconsideration, supported by *amicus* statements of the American Civil Liberties Union, the California Retail Association and counsel for another large group of retailers, was also denied on December 17. The parties have subsequently agreed to submit their briefs to the Court of Appeals before the end of the year and to jointly petition that court to conduct oral argument and determine the case as soon thereafter as possible.

potentially substantial and far-reaching consequences thereof.

3. Consent to Homart's filing a brief as *amicus curiae* was sought pursuant to Rule 42 of this Court. By telephone advice of December 19, 1969, counsel for Petitioners declined to grant such consent.

4. If leave is granted to file a brief as *amicus curiae*, Homart will seek only to discuss those matters which affect its vital interests and the brief will otherwise be short and relevant so that the Court's time will not be misspent.

Respectfully submitted,

ALLEN B. GRESHAM,
LONERGAN, JORDAN & GRESHAM,
Attorney for Homart Development Co.

IN THE

Supreme Court of the United States

October Term, 1969
No. 74

CLIFFORD TAGGART, *et al.*,

Petitioners,

vs.

WEINACKER'S, INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

Brief of Homart Development Co. as Amicus Curiae.

Interest of the Amicus Curiae.

Homart Development Co. (hereinafter referred to as "Homart") is a Delaware corporation engaged in the ownership and operation of eight shopping centers throughout the United States. Homart is one of the respondents in a proceeding before the California District Court (hereinafter referred to as the "California case")[1] which involves issues related to but

[1] *Diamond, et al. v. Bland, et al.*, 4th Civ., No. 10084. The parties have jointly sought to expedite the proceeding in order to obtain a final determinaton by the California courts at the earliest possible date. Thus, the critical event—Homart's request (under threat of arrest pursuant to a San Bernardino shopping center no-trespass ordinance) that plaintiffs cease from engaging in the solicitation of signatures on an environmental pollution initiative.

(This footnote is continued on the next page)

nevertheless distinct from those raised in the instant case. The interest of the *amicus* is that the Court should be aware of the pendency of that proceeding and not dispose of the different questions there involved. Alternatively, should the Court desire to determine such matters, Homart's concern is that the Court should be aware of the dimensions of such issues and its position with respect thereto.

petition on both the common aisleways of the interior mall area and the exterior adjacent sidewalks of its shopping center—occurred on October 30, 1969. Plaintiffs' complaint, seeking a preliminary and permanent injunction to preclude such alleged interference with their Constitutional rights, was filed on November 5 and was denied, after a full hearing, by the Superior Court of San Bernardino County on November 14. An appeal was filed in the District Court of Appeal three days later and on December 10, a joint petition was made to the California Supreme Court that it transfer the case to itself for hearing and decision. This petition was denied by the court on December 12 and a request for reconsideration, supported by *amicus* statements of the American Civil Liberties Union, the California Retail Association and counsel for another large group of retailers, was also denied on December 17. The parties have subsequently agreed to submit their briefs to the Court of Appeals before the end of the year and to jointly petition that court to conduct oral argument and determine the case as soon thereafter as possible.

ARGUMENT.

The California case, just as the instant case, requires a resolution of various questions left unanswered in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308. Both cases thus involve the conflict between the First Amendment rights of those who wish to utilize the private property of another to communicate a message and the Fifth Amendment rights of the property owner who opposes such a use. The nature of the issues involved, however, is quite separate and distinct.

The questions raised by the present case concern the ramifications resulting from the substantial physical distinctions between the small, single retail store here involved and the significantly larger shopping center of *Logan Valley*: for example, whether the interference occasioned by picketing or other forms of expression in a small, congested area, or the availability in such a situation of other effective and readily accessible alternative channels of communication, is a sufficient basis for protecting the business interests involved.

Conversely, the California case is one where the salient differences from *Logan Valley* do not concern the physical nature of the situs: the particular shopping center there involved, the Inland Center in San Bernardino, is a large regional center which closely resembles in appearance and function that of *Logan Valley*. Rather, in contrast to the union organizational picketing involved in *Logan Valley*, the objective of the communication in the California case is the solicitation of signatures by a non-labor group on an environmental pollution initiative petition admittedly un-

related in purpose to Homart or any of the co-owners or tenants of the Center. Another critical distinction involves one of the locations chosen by the plaintiffs to accomplish their objective in the California case: the common aisleways of an enclosed, air-conditioned, well-maintained interior mall. Finally, the cases also differ, in view of the dissimilar purpose of the use sought in the California case from that in *Logan Valley*, in the wide variety of alternative forums for reaching the desired audience available in the former case.

The California case thus raises the question, specifically not resolved in *Logan Valley*, of whether a shopping center owner's "property rights could, consistently with the First Amendment, justify a bar on [communication] which was not thus directly related, in its purpose to use to which the shopping center property was being put" (391 U.S. at fn. 9).[2] It poses the issue of whether the alternative, effective means of dissemination available where such a nexus is absent similarly may warrant a reasonable regulation of the asserted free speech rights involved.[3] And it also involves the question of whether, because of the increased obstruction and interference occasioned by the plain-

[2] *Cf. Peace v. Miles*, 407 F. 2d 73 (2nd Cir., 1968) (holding that students could be prohibited from demonstrating at the football stadium of a university on the basis that the stadium was not a traditional place of public protest and that the protestors had "ample chance to make their point" at other places on the campus); and *Adderley v. Florida*, 385 U.S. 39 ("the State, no less than the private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated").

[3] *Cf. NLRB v. Babcock & Wilcox*, 351 U.S. 105

tiffs' utilization of the common aisleways of an enclosed mall to communicate their message, Homart may properly invoke the proscription of *Logan Valley* that "the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it" (391 U.S. at 20-1). None of these potentially substantial and far-reaching matters are involved in the instant case.

In view of this separate nature of the fundamental questions involved, Homart believes that the present controversy should be decided on its own facts and in such a manner as not to be dispositive of the broader and different issues of the California case. Such a limited decision would be in accord with the principle that this Court only deals "with concrete and specific issues raised by actual cases . . . not with . . . theoretical disputes" (*Allen Bradley Local 1111, United Electrical Workers v. NLRB*, 315 U.S. 740, 746) and that "courts deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances" (*Associated Press v. NLRB*, 301 U.S. 103, 132).

The *amicus* brief submitted in the instant case by the AFL-CIO disregards these precepts. It seeks instead to have here adjudicated a host of asserted wide-ranging theories not relevant to a resolution of the present controversy, but which would directly govern the California case. For example:

1. The AFL-CIO argues that a property owner has no right *whatsoever* to "shut off communication whose message is abhorrent to him" and that "where First Amendment rights are at stake common law property concepts . . . have no legitimate role to play" (AFL-CIO Br., p. 10). These sweeping generalizations blatantly ignore the numerous references to permissible regulation of First Amendment rights, by reason of the "legitimate role" of "common law property concepts", contained in *Logan Valley*; for example, that even public property "may be regulated so as to prevent interference with the use of which the property is ordinarily put by the State" (391 U.S. at 320); that the result in *Logan Valley* was founded on the absence of any showing there that the picketing sought "was significantly interfering with the use to which the mall property was being put by both respondents and the general public" (391 U.S. at 323); or, as differently stated elsewhere in the decision, that its *sine qua non* was the Logan Valley Center owner's inability to raise "any significant claim to protection of the normal business operation of [his] property" (391 U.S. at 324). It grossly misstates the law, as well as the logic, which must be controlling in the present case to urge upon the Court any blanket talisman as the panacea for the delicate balance to be struck between Constitutional rights in the sensitive area here involved, a balance "which must be obtained with as little destruction of one [right] as is consistent with the maintenance of the other [right]".[4]

[4] *Id.* at 112.

2. The AFL-CIO further argues that the Constitutional rights here at issue cannot be measured by "the metes and bounds of the site" (AFL-CIO Br., p. 17). Yet, on the other hand, it acknowledges that there is no absolute right to picket or pamphleteer inside a store or in "an area devoted to selling or [in] one in which there is a true interest in privacy" (*Id.* at 14).[5] Surely, the only justification for regulating the use sought in such situations must be the "metes and bounds" of the situs involved, i.e., that regulation of communication is permissible to the extent that the area chosen therefor creates an unreasonable hardship on the property owner and other members of the public and improperly disregards less onerous available alternatives. The same reasoning is also clearly applicable where the picket does not actually introduce inside the store or selling area but chooses instead a site where his presence has a similar obstructive effect—as, for example, the enclosed exterior mall of the California case or, perhaps, the exterior of the small Weingarten store involved in the instant case.

3. The AFL-CIO indulges in another unwarranted over extension of *Logan Valley* when it asserts that "the permissible range of regulation does not include the power to create" a "'sanctuary' from which some members of the public may be excluded merely because of the ideas they es-

[5] See also the emphasis placed by *Logan Valley* on the site there chosen by the plaintiffs, a location found to constitute the only effective channel of communication (apart from the interior of the store) available to reach the desired audience. 391 U.S. at 322-3.

pouse" (AFL-CIO Br., p. 15). *Logan Valley*, as previously noted, emphasized that the use there sought was "for a purpose generally consonant with the use to which the property is actually put" (391 U.S. at 319-20) or, in the words of the concurring opinion, for a purpose "directly related to that shopping center business" (391 U.S. at 326). The decision clearly did not intend, nor has any other decision of this Court so intended, to create a license on the part of any one segment of the public to utilize the private "sanctuaries" of another to espouse *any* ideas they may desire. Such a law would manifestly deprive the owners of such property of a portion thereof without due process of law or just compensation. It would, in short, seriously endanger the Constitutional basis on which private ownership of property rests in the United States.

This Court is not required to decide the merits of generalizations such as those described above in order to determine the instant controversy. The decision instead should be based solely on the particular facts here involved, including the findings of the Alabama courts, based on their knowledge of local feelings and responsibilities, as to the interference and potential disruption of the domestic peace which was occasioned by the plaintiffs' conduct.

Conclusion.

Decision in the present case should be limited to the particular factual situation involved. It should not resolve the different issues of picketing for a non-related purpose and picketing on an enclosed mall which are involved in the California case but not before the Court here. If the Court should, nevertheless, desire to pass on these issues, it is submitted that all parties would benefit by delaying a decision herein until the California case has been finally determined by the Courts of the State.*

Respectfully submitted,

ALLEN R. GROSSMAN,
KONIGSBERG, JORDAN & GROSSMAN,
Attorneys for Human Development

*This Court has granted similar requests in the past, as the

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL., *Petitioners*

v.

WEINACKER'S, INC., *Respondent*

On Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONERS

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IN THE

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REPLY BRIEF FOR PETITIONERS

I. THE CONTROVERSY IS PREEMPTED

The deep embedment in the work of the NLRB of the subject of picketing and handbilling on private but open property is illustrated by two cases that we have not previously considered.

1. On December 9, 1969, the Court of Appeals for the Seventh Circuit decided *N.L.R.B. v. Monogram Models*, 72 LRRM 2953. The Court of Appeals con-

unfair labor practice for an employer to threaten non-employee union organizers with arrest and prosecution for criminal trespass for distributing union literature on the shoulder of a highway which, while privately owned, was used for pedestrian travel. The Court explained that (72 LRRM at 2940):

> In our view, the shoulder area here in dispute is legally indistinguishable from a sidewalk. The only difference is that a sidewalk is an improved concrete way for pedestrian travel. This shoulder is thus an unimproved sidewalk or walkway—call it what you will. Access to such a public way is associated with First Amendment rights. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375 (7th Cir. 1953). Handbilling is within the protection of the First Amendment. *Logan Valley, supra.* The record is devoid of any facts which even hint that the Union agents were disorderly or otherwise removed themselves from the First Amendment's protective pale. Respondent could not, then, without committing a Section 8(a)(1) violation, threaten the non-employee organizers with criminal trespass prosecution, since their use of the property was lawful and protected. *Logan Valley, supra, Marshall Field & Co., supra.*

2. In *Fashion Fair, Inc.*, 159 NLRB 1435, 1440,[1] to remedy the eviction of pickets from a small shopping center, the NLRB entered an order requiring the employer to cease and desist from "Ordering employees to leave public or quasi-public areas while they are lawfully engaged in peaceful picketing of . . . [the employer's] premises or in other lawful concerted activity." The power of the NLRB to enter this order protecting

[1] Noted at p. 13, n. 9, of the NLRB's *amicus* brief.

peaceful picketing from employer infringement bars the power of a State to prohibit or punish the identical class of conduct as a trespass. The minimum purpose of preemption is to prevent the collision which would result were two separate systems of law allowed to operate on the same subject matter. "The second to act must either follow the first, which would make its action useless or vain, or depart from it, which would produce a mischievous conflict." *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U.S. 767, 776. The supremacy of federal law avoids conflict by requiring that precedence be accorded to it.

The respondent nevertheless contends that the enjoined conduct in this case is not within the preempted domain. Central to respondent's argument is the assertion that, as the power of the NLRB to adjudicate the subject is activated by the filing of an unfair labor practice charge claiming that the employer has interfered with the rights guaranteed by section 7 of the NLRA in violation of section 8(a)(1), the employer himself has no independent access to the NLRB to assert, and the NLRB has no authority to give him relief, on his contrary claim that the entry of others on his property is prohibitable trespass not protected by federal law (res. br. pp. 5, 28-31). But this argument is foreclosed by this Court's decision in *Garmon*. For, as the quotation from *Garmon* in our opening brief makes crystal clear (br. pp. 16-17), preemption does not depend on assurance that the NLRB will adjudicate the contested conduct. For a variety of reasons, of which the particular one advanced by respondent is no different, the NLRB may or may not take the particular controversy in hand. This makes no difference. The factor which is critical to preemption

is that the class of conduct is within the NLRB's power. If it is, as it clearly is here, then avoidance of conflict requires that the class of conduct be free of State governance. It would be intolerably mischievous if a State, upon a complaint alleging trespass, were to prohibit picketing or handbilling which, on an unfair labor practice charge, the NLRB were to find to be protected activity. Conflicting orders would prohibit in one tribunal the identical conduct which is protected in another tribunal. Preemption precludes that collision by investing the NLRB with sole authority in the field. And occasional lack of decision of a particular controversy by the NLRB is a small price to pay for maintenance of overall adjudicatory harmony. Indeed, if the particular controversy does not happen to be determined by the NLRB, all that it means is that the conduct goes without governmental regulation, and the conclusion that conduct—particularly peaceful picketing and handbilling—is not regulable but is within the free play of contending forces is part of the recognized regime that Congress has established under the NLRA. *Garner* v. *Teamsters Union*, 346 U.S. 485, 500; *Hannah Mining Co.* v. *MEBA*, 382 U.S. 181, 187, 189, 193.

It is also well to recall that part of the reason for preemption is the difference between the state and federal procedures which operate on the controversy. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 242-243; *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. This difference is particularly telling in relationship to the prohibition of picketing and handbilling, the expression of free speech (pet. opening br. p. 29, n. 11). As this case and *Logan Valley* both illustrate, the State initially prohibits picketing and handbilling

solely on an *ex parte* application, so that free speech is squelched during the critical part of the controversy without even prior notice or hearing. The NLRB never acts in this fashion. Its own procedures require full notice and hearing. When it seeks temporary injunctive relief from a federal district court preliminary to its own order pursuant to section 10(j) or (l) of the NLRA, it almost never seeks *ex parte* relief, and never seeks any relief without a prior administrative investigation. The precipitance of state procedure activated by private initiative, in contrast with the care of federal procedure under NLRB control, confirms the need for preemption.

Finally, if preemption does not prevail, it puts this Court to the necessity of deciding for itself whether the State has prohibited federally-protected conduct. For of all the alternatives which may be available, the avenue which is not open is to allow State intercession without federal oversight in a field in which Congress has proclaimed the rules. Absent preemption, this Court is the only federal tribunal which can provide control. This Court has wisely decided that it should not act as the initial federal tribunal and has fashioned preemption to that end (Pet. opening br. p. 48 and n. 27). Respondent would thus require the return to an approach which experience has caused this Court to abandon.[2]

[2] It is possible to assure that the controversy will be brought within the NLRB machinery by a requirement that, as a condition of entertainment of a defendant's preemption plea, the defendant shall file an unfair labor practice charge with the NLRB. We do not, however, suggest this course. Preemption would founder if a state court were free to look to the status of the controversy before the NLRB even to the extent of ascertaining whether a charge has been filed with that agency. It is unfortunately true

II. THE CONTROVERSY IS NOT MOOT

Respondent informs the Court that, while it retains ownership of the property, it no longer operates a store on it, but that it has leased its property to Delchamps, Inc., and Walgreen's, Inc., who operate two separate stores on that property as lessees (res. br. pp. 23-24, A1). Respondent states that this change does not moot the controversy (res. br. pp. 4, 23-25). We agree.

The injunction bars "trespassing upon the property of the complainant [Weinacker's, Inc.] . . ." (A. 16, 95). The property remains in the ownership of Weinacker's. Weinacker's retains full power to invoke the injunction, either during the period of the leases, or at a future time when it may choose to resume operation of a store on its own. As lessor, its ownership interest gives it ample standing to assert that the injunction has been violated by trespass on its property. Those enjoined do not dare assume that the injunction is not

---

that many state courts, especially at the *nisi prius* level, are inhospitable to preemption. It is predictable that inquiry into the filing of a charge with the NLRB would quickly turn into a reason for state action, not state forbearance. If preemption is to work the rule must be blunt. And that means that state inquiry must end with ascertainment that the class of conduct is arguably subject to the NLRA, whether or not in a particular instance the NLRB has taken the specific dispute in hand. But if a requirement of the filing of an unfair labor practice charge, where the controversy pertains to access to private but open property, is formulated, it should be given prospective application only. It would be unfair to apply it in this case without any forewarning that it was requisite.

Of course, once the NLRB decides the status of the activity "with unclouded legal significance," and concludes that it is neither protected, prohibited, nor within the free play of contending forces, the State may then act. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245-246.

in full force. In *Logan Valley*, the action was brought by both the lessor and the lessee. The injunction in this case thus retains its full vitality. The controversy is therefore clearly not moot.

The change does point up the indistinguishability of this case from *Logan Valley*. In this case, there are now two stores operating on the shared property served by a common parking lot, precisely as there was when the injunction was granted in *Logan Valley*. Furthermore, there is undeveloped land on the property available for additional store use in the future (res. br. p. A35). Thus, the only difference between this case and *Logan Valley* is that the shopping center in this case is smaller than in *Logan Valley*. But the fitness of open property for the expression of First Amendment rights in a dispute pertaining to an operation on that property surely cannot be measured by its size.[3]

The change to multiple store operation by separate and independent businesses now also brings into play the NLRA's prohibition of secondary boycotts. As

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[3] The complete answer to respondent's argument (br. pp. 18-23) that at a small shopping center, as opposed to a large one, the right to picket and handbill on the exterior store grounds may be banned because the adjacent publicly-owned street affords the union an adequate opportunity for communication was given by Mr. Justice Black in his concurring opinion in *N.L.R.B.* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 80: "This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." Indeed, respondent's vigorous efforts to remove the pickets from the shopping center here demonstrates the obvious—that picketing and handbilling on the public street is far less effective than picketing and handbilling on the sidewalk directly in front of the entrance to the store.

this Court observed in *Logan Valley*, "Petitioners point out that they could conceivably find themselves charged with conducting an illegal secondary boycott if they do not comply with the rules laid down by the NLRB and the courts governing common situs picketing" (391 U.S. at 323, n. 12). Relegation of the picketing to the public entrances to the parking lot opens the Union to the risk that it will be found guilty of a secondary boycott if it does not adequately circumscribe its picketing to limit its reach to the offending store. Even if properly confined, the picketing of a common entrance necessarily has an impact on others within the area who are unconcerned in the dispute, so that the unavoidable spill-over needlessly embroils neutrals in a controversy not their own. Both the legal risk that the Union runs and the economic consequence that neutral employers suffer are avoided by conducting the picketing and handbilling in the immediate vicinity of the entrance to the store of the offending employer, the natural and effective place of protest. In its current operation, by banishing picketing and handbilling to the removed shared entrances to the parking lot, the injunction undercuts the balance which Congress has drawn between protected primary conduct and prohibited secondary activity.[4]

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[4] For a full description of this aspect of the matter, now completely applicable to the multiple store operation on the property of Weinacker's, see pages 42-49 of petitioners' brief in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 391 U.S. 308, October Term, 1967, No. 478.

Furthermore, were the Union to seek to organize the employees of Delchamps or Walgreen's, and were it to picket in conjunction with this effort, the picketing would implicate another part of the congressional scheme. The picketing might be prohibited by section 8(b)(7), protected by section 7, or within the free play of contending forces. For this aspect of the matter, see pp. 37-42 of petitioners' brief in *Logan Valley*.

Accordingly, for these reasons, in addition to those stated in our opening brief, the judgment should be reversed.

Respectfully submitted,

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January 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL., *Petitioners*

v.

WEINACKER'S, INC., *Respondent*

On Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 41(5) of the Rules of the Court, Petitioners move the Court for leave to file the annexed supplemental brief to bring to the Court's attention the decision of the Arizona Court of Appeals in *Transport Workers Union, Local 502* v. *Tucson Airport Authority*, 61 CCH Lab. Cas. ¶ 10,596, decided on January

19, 1970, subsequent to the argument before this Court, which is relevant to petitioners' position that the controversy is within the field preempted by the National Labor Relations Board.

Respectfully submitted

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February 1970

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On Writ of Certiorari to the Supreme Court of Alabama

SUPPLEMENTAL BRIEF FOR PETITIONERS

On January 19, 1970, the Arizona Court of Appeals decided *Transport Workers Union, Local 502* v. *Tucson Airport Authority*, 61 CCH Lab. Cas. ¶ 10,596, and held that a controversy concerning the permissibility of peaceful picketing on private property opened to public entrance was within the domain preempted by the National Labor Relations Board.

The Arizona Court of Appeals described the controversy confronting it as follows (61 CCH Lab. Cas. at p. 17,961):

> The Transport Workers Union, Local 502, AFL-CIO, was engaged in a strike with American Airlines, Inc., subtenant of the Tucson Airport Authority. The Union placed one picket on the sidewalk outside the American Airlines ticket office on the upper ramp of the Airport Terminal. On March 10, 1969, the Airport Authority sought an injunction prohibiting the Union from further picketing. A restraining order was issued and an injunction bond was posted, expressly conditioned " . . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(E), as amended, A. R. C. P.
>
> Before the hearing on the order to show cause why the Union should not be enjoined, on March 17, 1969, a motion to quash and dissolve the restraining order was made on the basis that the Airport was subject to public use, and the matter was pre-empted by the National Labor Relations Act. This motion was not granted, evidence was heard, the temporary restraining order was kept in effect " . . . until such time as the court can rule upon the Preliminary Injunction. . . . " and the matter was taken under advisement. By minute entry on April 3, 1969, and later order, the court denied the Union's motion to quash and dissolve, and concluded that " . . . in view of the settlement of the labor dispute between the defendants and American Airlines, Inc." the restraining order was no longer to remain in effect. The Union was thus prevented from presenting evidence of its damages.

After concluding that the order was appealable and the controversy not moot, the Arizona Court of Ap-

peals turned to "consider the Union's contention that the trial court was preempted from considering this matter because it was arguably within the scope of the National Labor Relations Act." *Id.* at 17,963. The Court quoted from *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, to delimit the correct preemption standard (*ibid.*), and then stated that there was no element of violence present or "a problem of compelling state interest" (*id.* at 17,963-64):

> The record here discloses no showing of violence or imminent threats to public order. Although the complaint requesting injunctive relief alleged violence, at the proceeding on the petition for the preliminary injunction and order to show cause, counsel for the Airport Authority in his opening statement said:
>
> > "We are not alleging that these people were violent or caused any physical altercation during the period that they were picketing. That is not part of our allegation. We do believe that their mere presence there as pickets has inherent in it the possibility that such things might arise, but nothing of that sort, we will offer no evidence that that has occurred and that is not the basis of our action for an injunction."
>
> There likewise has been no showing that this case presents a problem of compelling state interest.

The Arizona Court of Appeals next observed that it made no difference that the union's labor dispute was with the airline rather than the airport (*id.* at 17,964):

> The only contention offered by the Airport Authority to indicate that this matter is not preempted by the N. L. R. A. is the contention that they were not directly involved in a labor dispute with the Union, and that the only dispute was between the Union and American Airlines, Inc. It

has been held, however, that picketing of a business enterprise cannot be prohibited solely on the ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 20 L. Ed. 603, 88 S. Ct. 1601 (1968); *A. F. L.* v. *Swing*, 312 U.S. 321, 85 L. Ed. 1145, 61 S. Ct. 568 (1941). And see *Plumbers, Etc., Local 298* v. *County of Door*, 359 U.S. 354, 3 L. Ed. 872, 79 S. Ct. 844 (1959) wherein it was held that a county, not being directly involved with picketing of a nonunion contractor, was not entitled to a state court injunction prohibiting such picketing because the matter was within the jurisdiction of the National Labor Relations Board.

The Arizona Court of Appeals concluded that the controversy was preempted and the state court was therefore without jurisdiction (*ibid.*):

> We also note that our acceptance of the Airport Authority's position would effectively shield all the businesses on the Airport's premises from the purpose of the National Labor Relations Act and would thus destroy one of labor's most vital weapons. We do not believe the Airport Authority is entitled to an injunction on this basis alone, allowing its subtenants, which include in addition to various common carriers, a barber shop, bank, restaurant, gift shop, custom broker, car rental agencies, parking lot operator, motel and restaurant, to deny the unions one of their rights of collective bargaining.
>
> Believing this matter is arguably subject to the jurisdiction of the National Labor Relations Board under Section 7 of the National Labor Relations Act, we remand this matter to the lower court with directions that its order be set aside and directions to grant the Union's motion.

The Arizona Court of Appeals finally noted that its conclusion made it unnecessary to reach the substantial First Amendment question (*id.* at 17,964, n. 3):

> We also believe a substantial question is presented in this case that the Union's freedom of speech under the First and Fourteenth Amendments to the U. S. Constitution has been violated. *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 20 L. Ed. 603, 88 S. Ct. 1601 (1968). Because of our disposition of this case, we do not find it necessary to consider this question.

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February 1970

APPENDIX

TRANSPORT WORKERS UNION, LOCAL 502 ET AL., *Appellants*

v.

TUCSON AIRPORT AUTHORITY, INC., *Appellee.*

ARIZONA COURT OF APPEALS, DIVISION TWO.

NO. 2 CA-CIV 754. JANUARY 19, 1970.

On Appeal from Superior Court of Pima County.

HATHAWAY, J.: The Transport Workers Union, Local 502, AFL-CIO, was engaged in a strike with American Airlines, Inc., a subtenant of the Tucson Airport Authority. The Union placed one picket on the sidewalk outside the American Airlines ticket office on the upper ramp of the Airport Terminal. On March 10, 1969, the Airport Authority sought an injunction prohibiting the Union from further picketing. A restraining order was issued and an injunction bond was posted, expressly conditioned "... for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(E), as amended, A. R. C. P.

Before the hearing on the order to show cause why the Union should not be enjoined, on March 17, 1969, a motion to quash and dissolve the restraining order was made on the basis that the Airport was subject to public use, and the matter was pre-empted by the National Labor Relations Act. This motion was not granted, evidence was heard, the temporary restraining order was kept in effect "... until such time as the court can rule upon the Preliminary Injunction, ..." and the matter was taken under advisement. By minute entry on April 3, 1969, and later order, the court denied the Union's motion to quash and dissolve, and concluded that "... in view of the settlement of the labor dispute between the defendants and American Airlines, Inc." the restraining order was no longer to remain in effect. The

Union was thus prevented from presenting evidence of its damages.

On July 9, 1969, this court denied the Union's petition for a Writ of Certiorari or Writ of Mandamus "It appearing to this court that the order . . . is appealable under A. R. S. Sec. 12-2101E, as amended."

At the outset of this appeal, the Airport Authority challenges the appealability of the order, stating that since the lower court has not held a final hearing nor rendered a final judgment on the issue of whether a permanent injunction should be granted, an appeal does not lie.

We disagree with the Airport Authority's conclusions. While in a general situation the right to appeal may require waiting for a decision on the granting of the permanent injunction, *Connell v. DuLien Steel Products, Inc.* (1957, CA 5 La.) 240 F. 2d 414, here, by finding the matter moot, the trial court has for all practical purposes effectively put an end to the litigation.

A. R. S. § 12-2101F(2), as amended, states that an appeal may be taken from an order "Granting or dissolving an injunction, or refusing to grant or dissolve an injunction, ..."

In *Drachman v. Jay*, 4 Ariz. App. 70, 417 P. 2d 704 (1966), which involved an appeal from an order dissolving a temporary restraining order and denial of a petition for a preliminary injunction, the question of appealability of such an order under A. R. S. § 12-2101F(2) was challenged, the appellees contending that language in the order denying the preliminary injunction was "verbiage without meaning." This court stated:

> "An order 'granting or dissolving an injunction' is an appealable order. * * * A temporary restraining order is a species of an injunction. * * * However, we refuse

> to commit ourselves in this case as to whether an appeal from an order dissolving a temporary restraining order alone would be appealable. We consider the order refusing a preliminary injunction to be in no sense 'verbiage without meaning' and hold this matter to be properly before us as an appeal from this order." 4 Ariz. App. at 72 (Citations omitted)

Here the order appealed from not only denied the Union's motion to quash and dissolve the temporary restraining order, but also in effect denied the preliminary injunction. In *Bulova Watch Company v. Super City Department Stores of Arizona*, 4 Ariz. App. 553, 422 P. 2d 184 (1967), which involved an appeal from the denial of a preliminary injunction, the court stated: "An appeal may be taken from an order granting or refusing to grant an injunction at any stage of the case in which application for the injunction is made." 4 Ariz. App. at 555.

It would appear that on the reasoning of the above cases that an appeal may be taken in this case. There are other bases for this decision however. The Airport Authority concedes in their brief that under Rule 65D,[1] as amended, the temporary restraining order could not have been extended beyond March 30, 1969. However, by refusing to grant the Union's motions and ordering the restraining order to remain in effect until the lower court could rule upon it, the restraining order was actually effective until April 3, 1969 when the minute entry was made denying the motion to quash and concluding that the matter was moot.

In *Missouri-Kansas-Texas R. Co. v. Randolph* (1950, CA 8 Mo.) 182 F. 2d 996, the court held that a restraining order

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[1] Rule 65D provides in part that every restraining order ". . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a *like period* . . . ." (Emphasis added).

which continued in effect after a motion to dissolve was made became a temporary injunction and was thus appealable. In *Harris v. Gibson* (1963, CA 5 Ga.) 322 F. 2d 780, *certiorari denied* 376 U. S. 908, 11 L. Ed. 2d 606, 84 S. Ct. 661, the court held that a lower court's order which continued a temporary restraining order in force ". . . was, in effect, the granting of a preliminary injunction." 322 F. 2d at 781. And in 19 A. L. R. 3d at 425 it is stated that "Under statutes or Rules permitting an appeal from orders pertaining to injunctions, where the practical effect of an order granting, continuing, or refusing to dissolve a temporary restraining order is deemed to be that of an injunction, it may be held appealable regardless of its designation." See also the annotations "Appealability of Order Granting, Extending or Refusing to Dissolve Temporary Restraining Order," 19 A. L. R. 3d 403, and "Appealability of Order Refusing to Grant or Dissolve Temporary Restraining Order," 19 A. L. R. 3d 459.

Moreover, by finding the matter moot the trial court, we believe, affected a substantial right of the Union which would place it in an "aggrieved" status. In *Liner v. Jafco*, 375 U. S. 301, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964), the U. S. Supreme Court faced a situation similar to the one before us. There, an injunction against picketing on a construction site was granted by the trial court. Pending appeal, construction at the site was completed. The State Court of Appeals affirmed the granting of the injunction, noting that the matter had become moot. The U. S. Supreme Court, in response to the contention that the matter was moot, stated:

> "The petitioners plainly have 'a substantial stake in the judgment * * *,' *Fiswick v. United States*, 329 U. S. 211, 222, 67 S. Ct. 224, 230, 91 L. Ed. 196, which exists apart from and is unaffected by the completion of construction. Their interest derives from the undertaking of respondent Jafco, Inc., in the injunction bond to in-

demnify them in damages if the injunction was 'wrongfully' sued out." 84 S. Ct. at 394.

Not only has the Union pressed from the beginning of this case a federal right that the matter was pre-empted by the National Labor Relations Act, as was done in *Liner v. Jafco*, but additionally the Union contends the trial court in issuing the restraining order and then letting it continue in effect beyond the period permitted by Rule 65D has violated their right of free speech under the First and Fourteenth Amendments to the U. S. Constitution. Considering all the circumstances present here, we conclude that this matter is properly appealable. *Local No. 438, Construction & General Laborers' Union v. Curry*, 371 U. S. 542 (1963) 9 L. Ed. 2d 508, 83 S. Ct. 531; *State v. Birmingham*, 95 Ariz. 310, 390 P. 2d 103, rehearing 96 Ariz. 109, 392 P. 2d 775 (1964).

We shall first consider the Union's contention that the trial court was pre-empted from considering this matter because it was arguably within the scope of the National Labor Relations Act. The U. S. Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959) held:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to

control conduct which is the subject of national regulation would create potential frustration of national purposes." 79 S. Ct. at 779.

The Supreme Court said the test to be applied to determine if the state courts were pre-empted was that:

"When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ." 79 S. Ct. at 780.

The Supreme Court added:

"State jurisdiction has prevailed in these situations (conduct marked by violence and imminent threats to the public order) because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." 79 S. Ct. 781.

These pronouncements by the Supreme Court have been applied in Arizona in *Oss v. Birmingham*, 97 Ariz. 242, 399 P. 2d 655 (1965). And see *United Association of Journeymen, etc. v. Marchese*, 81 Ariz. 162, 302 P. 2d 930 (1956).

The record here discloses no showing of violence or imminent threats to public order. Although the complaint requesting injunctive relief alleged violence, at the proceeding on the petition for the preliminary injunction and order to show cause, counsel for the Airport Authority in his opening statement said:

"We are not alleging that these people were violent or caused any physical altercation during the period that they were picketing. That is not part of our allegation. We do believe that their mere presence there as pickets has inherent in it the possibility that such things might arise, but nothing of that sort, we will

offer no evidence that has occurred and that is not the basis of our action for an injunction."

There likewise has been no showing that this case presents a problem of compelling state interest. *San Diego Building Trades Council v. Garmon, supra.*

The only contention offered by the Airport Authority to indicate that this matter is not pre-empted by the N. L. R. A. is the contention that they were not directly involved in a labor dispute with the Union, and that the only dispute was between the Union and American Airlines, Inc. It has been held, however, that picketing of a business enterprise cannot be prohibited solely on the ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U. S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968); *A. F. L. v. Swing*, 312 U. S. 321, 85 L. Ed. 1145, 61 S. Ct. 568 (1941). And see *Plumbers, Etc., Local 298 v. County of Door*, 359 U. S. 354, 3 L. Ed. 2d 872, 79 S. Ct. 844 (1959) wherein it was held that a county, not being directly involved with picketing of a non-union contractor, was not entitled to a state court injunction prohibiting such picketing because the matter was within the jurisdiction of the National Labor Relations Board.

We also note that our acceptance of the Airport Authority's position would effectively shield all the businesses on the Airport's premises from the purpose of the National Labor Relations Act and would thus destroy one of labor's most vital weapons. We do not believe the Airport Authority is entitled to an injunction on this basis alone, allowing its subtenants, which include in addition to various common carriers, a barber shop, bank, restaurant, gift shop, custom broker, car rental agencies, parking lot operator, motel and restaurant, to deny the unions one of their rights of collective bargaining.

Believing this matter is arguably subject to the jurisdiction of the National Labor Relations Board under Section 7 of the National Labor Relations Act,[2] we remand this matter to the lower court with directions that its order be set aside and directions to grant the Union's motion.[3]

HOWARD, Ch. J. and KRUCKER, J., concur.

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[2] Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other muutal aid or protection, ..."

[3] We also believe a substantial question is presented in this case that the Union's freedom of speech under the First and Fourteenth Amendments to the U. S. Constitution has been violated. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U. S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968). Because of our disposition of this case, we do not find it necessary to consider this question.